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PRE-TRIAL CHAMBER II

Before:

**Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

***THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public Redacted Version

**Public Redacted Version of ‘Corrigendum to the “Defence Observations to the
“Corrected Version of the ‘Prosecution Response to the Defence’s Confirmation
Submissions’, ICC-01/14-01/18-376-Conf-Corr,” (ICC-01/14-01/18-382-Conf) 10
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Source: Defence of Patrice-Edouard Ngaïssona

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I. INTRODUCTION

1. The Defence of Patrice-Edouard Ngaïssona (“the Defence”) hereby submits its observations (“the Defence Observations”) on the “Prosecution Response to the Defence’s Confirmation Submissions”(“the Prosecution Response”),¹ pursuant to the Oral Order issued by Pre-Trial Chamber II (“the Chamber”) during the Hearing on Confirmation on Charges (“the Confirmation Hearing”), on 25 September 2019.²
2. The Defence submits that the Prosecution has failed to present in the Document Containing the Charges (“the DCC”), during the Confirmation of Charges hearing, and in the Prosecution Response sufficient evidence to establish substantial grounds to believe that Patrice-Edouard Ngaïssona committed the crimes with which he is charged pursuant to Article 61 of the Rome Statute.

II. MR NGAÏSSONA WAS NOT INVOLVED IN CREATING THE ANTI-BALAKA NOR DID HE PARTICIPATE IN THE COMMON PLAN

a. The Prosecution has failed to establish that COCORA was under Mr Ngaïssona’s patronage

3. The Prosecution both fails to undermine the Defence’s arguments regarding the lack of sufficient evidence to support a finding that COCORA was under Mr Ngaïssona’s patronage and impermissibly tries to rely on documents that are not part of the case record to substantiate that the organization was linked to Mr Ngaïssona. Even these items, however, are so lacking in probative value that they cannot meaningfully assist the Chamber in the determination of the issue.
4. In paragraph 3 and 4 of the Prosecution’s Response, the Prosecution does not substantiate why the Defence’s arguments regarding the lack of sufficiently probative evidence are not viable. The Prosecution’s submissions on the matter are limited to a footnote in which it clearly misinterprets the UN Panel of Experts Report.³

¹ ICC-01/14-01/18-376-Conf-Corr.

² ICC-01/14-01/18-T-10-FRA ET, pp. 4-5, lns 2-24.

³ Prosecution submissions regarding the report on the UN Panel of Experts Report in footnote 7 are simply incorrect. While the Panel composed the entirety of its report using a variety of sources among which calls with alleged Anti-Balaka elements and allegedly Mr Ngaïssona himself, the Report mentions its sources in support of each conclusion it made. Therefore, while the Report cites conversations with Anti-Balaka members and Mr Ngaïssona with respect to the two propositions that the movement is headed at the military level by Thierry

5. With the exception of one document,⁴ the entirety of the Prosecution's additional submissions regarding Mr Ngaïssona's links to COCORA refer to documents which are not on the Prosecution's list of evidence.⁵ These additional observations contravene the Chamber's order which specifically stated that the Prosecution must refer to specific items of evidence supporting any allegation since these items are not part of the Prosecution's evidence.
6. Moreover, the additional items which consist of a witness statement and secondary sources are of *de minimus* probative value. The Prosecution cites a PEXO witness statement, which demonstrates to what great lengths the Prosecution must go to find testimonial evidence of Mr Ngaïssona's involvement with COCORA. [REDACTED]'s statement on this point consists of speculation and should not be taken into account since the source of the information is unknown and the evidence contains very little concrete information. The witness states that Mr Ngaïssona, [REDACTED] and certain unnamed individuals put in place COCORA. This is the first time that the Prosecution implicates [REDACTED] in the forming of this group. Further this evidence is inconsistent with [REDACTED] in which the Defence was not able to locate a single reference in which he stated that he was part of the COCORA. The other additional items consist of NGO reports and media articles that do not provide evidence with respect to the allegation that Mr Ngaïssona was involved with the group. The evidence consists therefore of anonymous hearsay and is devoid of any probative value.

b. The Prosecution has failed to establish that Mr Ngaïssona and Mr Bozizé were sufficiently close to form an alleged inner circle

7. Instead of responding to the Defence's arguments regarding the Prosecution's failure to prove to the requisite standard that Mr Ngaïssona and Mr Bozizé had close links because they were part of the same family, the Prosecution simply submits that a close relationship is not

Lébéné and at the political level by Mr Ngaïssona. CAR-OTP-2001-0835 at 0876, footnotes 11, 12, it cites a website with respect to Mr Ngaïssona being the founder of COCORA and the president of the CAR Football Federation. If the authors of the Report made a distinction between the football federation and COCORA as the Prosecution claims, they would have inserted another footnote after COCORA and added another reference for this specific proposition as they did for the previous sentence. See footnotes 11 and 12 that refer to two findings within one sentence. CAR-OTP-2001-0835 at 0876.

⁴ CAR-OTP-2001-4359 at 4359.

⁵ [REDACTED] CAR-OTP-2090-0002 at 0006, para. 23; CAR-OTP-2074-0411 at 0420 ; CAR-OTP-2100-0042 at 0060. Some of these items were disclosed to the Defence on 7 October 2019, leaving the Defence with just three days to be apprised of their content and respond to them in the present Observations. See CAR-OTP-2100-0042 at 0060; CAR-OTP-2074-0411 at 0420.

dispositive of Mr Ngaïssona's participation in a common plan. This submission is not sufficient to overcome the weakness of the Prosecution's evidence since it is the Prosecution's submission that Mr Ngaïssona and Mr Bozizé were sufficiently close such that the Chamber can infer that they were part of an alleged inner circle.⁶

8. The Prosecution in its additional submissions alleges that Mr Ngaïssona's closeness and loyalty to Mr Bozizé can be inferred from the following submissions : (1) Mr Ngaïssona was elected as the deputy of the 4th arrondissement in January 2011 as a representative of the KNK party; (2) Mr Ngaïssona allegedly pledged public support to Mr Bozizé through three public statements and (3) Mr Ngaïssona was allegedly appointed Minister of Youth and Sports from February 2013 until March 2013 and (4) Mr Ngaïssona allegedly joined Mr Bozizé in Cameroon.⁷ With respect to submissions (3)-(4), the Prosecution merely repeats its submissions made in the DCC, and thus the Defence refers the Chamber to the Defence's oral submissions.⁸ The Prosecution's submissions (1) and (2) are unconvincing since no inference regarding potential closeness or loyalty can be drawn from them. Significantly, the Prosecution presents no additional evidence to prove kinship links between Mr Ngaïssona and Mr Bozizé.
9. Firstly, with respect to Mr Ngaïssona's being a deputy, the Defence stipulates that Mr Ngaïssona was elected deputy of the 4th arrondissement. The evidence showing that he ran as a member of the KNK party has no bearing on any closeness or loyalty to Mr Bozizé since the reasons for joining a political party are numerous and are not indicative of a particular affinity for the President who is from that party, and the KNK had many deputies.⁹
10. Secondly, the evidence the Prosecution cites to show that Mr Ngaïssona publically expressed support for Mr Bozizé does not support the inference that he was part of Mr Bozizé's inner

⁶ DCC, paras 34-35.

⁷ Prosecution Response, para 6.

⁸ The Defence provided the Chamber with evidence cited by the Prosecution in support of its submission that Mr Ngaïssona became Minister of Youth and Culture in the context of the implementation of the Libreville Peace Agreement. Contrary to the Prosecution's submissions the Defence did not simply admit that Mr Ngaïssona was appointed by Mr Bozizé. See footnote 16 of the Prosecution Response. Rather, the Defence submitted that Mr Ngaïssona along with members of the opposition were members of the National Unity Government that was created to achieve a peaceful solution to the crisis, and therefore was unrelated to any close relationship with Mr Bozizé. See ICC-01/14-01/18-T-009-CONF-FRA ET, pp.74-75; ICC-01/14-01/18-T-008-CONF-ENG ET, p. 85. With respect to Mr Ngaïssona joining Mr Bozizé in Cameroon, the Defence refers the Chamber to its submissions. ICC-01/14-01/18-T-008-CONF-ENG ET, pp.93-95.

⁹ See the evidence the Prosecution cites in footnote 13 of its Prosecution Response. CAR-OTP-2030-0984, at 0984; CAR-OTP-2018-0069, at 0127; CAR-OTP-2018-0174, at 0231

circle. The Prosecution refers to three statements allegedly made by Mr Ngaïssona.¹⁰ The first speech to which the Prosecution refers was made in the context of the peace march that was organized by Mr Ngaïssona in January 2013.¹¹

11. The second public statement cited by the Prosecution also relates to Mr Ngaïssona's commitment to a peaceful solution to the crisis between the Seleka coalition and the Bozizé government.¹² The statement is an extract of a message allegedly signed by Mr Ngaïssona. It was made on 14 January 2013 in the wake of the Libreville Accords. While the statement may refer to Mr Bozizé as a "messiah", it is clear that he is referred to as such in the context of the peace deal that was concluded in Libreville when the journalist reads out "[V]ous êtes l'homme de la situation. Nous le disons ainsi parce que d'aucuns pensent que vous ne devriez pas avoir une telle attitude vu votre grade de général d'armée et de chef de guerre expérimenté."¹³ This is the sentence that immediately precedes the sentence referring to Mr Bozizé as a messiah. Therefore, though some ("d'aucuns") may not agree with Mr Bozizé for choosing peace seeing as he is a general and an experienced military leader, the message states that he is a "homme de la situation" and a "messiah" that is set on developing the country and not leading it to war.¹⁴ This statement therefore provides no indicia of Mr Ngaïssona being particularly close to Mr Bozizé such that he would conceive a common plan that would involve regaining power through violent or criminal means.
12. The third statement relates to a public speech that Mr Ngaïssona gave in the context of the commemoration of Mr Bozizé 10 year anniversary of holding the Presidential office. This speech does not show any close links to Mr Bozizé as it was made in Mr Ngaïssona's professional capacity as Minister of Youth and was unrelated to defending the country through war.¹⁵

c. The Prosecution has failed to establish that Mr Ngaïssona participated in a common plan with the other alleged co-perpetrators in Cameroon

¹⁰ Prosecution Response, para 6, footnotes 14-15, 18.

¹¹ The Defence made extensive submissions on the content and context of this speech. ICC-01/14-01/18-T-008-CONF-ENG ET, pp. 84-86 ; ICC-01/14-01/18-T-009-CONF-ENG ET, pp. 66-67.

¹² Prosecution Response, para. 6, footnote 15.

¹³ CAR-OTP-2107-1487, at 1488.

¹⁴ Ibid. It should be noted that in the Central African context the term "messiah" would refer to Jesus, who preached a philosophy of non-violence.

¹⁵ See the present Observations, Section III.c. The Prosecution has failed to establish that Mr Ngaïssona's speeches did not have the effect of mobilising the youth.

13. Contrary to the Chamber's instructions, the Prosecution in lieu of submitting specific responses to Defence arguments, merely states that the Defence did not substantiate that Mr Ngaïssona did not participate in meetings whose objective was to reinstate Mr Bozizé as president, and that the criticisms of the evidence are unavailing. Never does the Prosecution, having the burden of proof, show why this is the case. The Prosecution's criticisms are without basis since the Defence made extensive references to the evidence when it submitted that the Prosecution failed to cite a single witness that was present during a meeting or other exchange in which Mr Ngaïssona, Mr Bozizé, and [REDACTED] discussed using Anti-Balaka elements to reinstate Mr Bozizé as President.¹⁶
14. Additionally, the Prosecution submits that it is uncontested that Mr Ngaïssona participated in meetings.¹⁷ The Prosecution mischaracterizes the Defence's submissions. Never did the Defence stipulate that there were meetings with Mr Ngaïssona and Mr Bozizé and any members of an alleged inner circle. Rather, the Defence indicated that out of all the alleged meetings or encounters cited in footnotes 59-62, only for three encounters, was there allegedly a witness that was present with Mr Ngaïssona.¹⁸ The Defence then made extensive submissions on the insufficiency of this evidence to establish a common plan to use Anti-Balaka elements to reinstate Mr Bozizé as president.¹⁹
15. Instead of presenting the Chamber with credible probative evidence indicating a specific meeting, encounter or conversation with the alleged members of the inner circle where Mr Ngaïssona specifically indicated that Anti-Balaka elements should be used, the Prosecution refers to: (1) its former submissions,²⁰ (2) to evidence of facts which the Defence did not dispute, and (3) to indirect evidence which either lacks sufficient probative value or whose probative value is substantially outweighed by the danger of unfair prejudice.
16. In paragraph 9, the Prosecution cites financial records and Mr Ngaïssona's passport that show Mr Ngaïssona's presence in YAOUNDE and DAOULA during the relevant period.²¹ The Defence submits that it is not in dispute that Mr Ngaïssona sought refuge in Cameroon after the Seleka took power in March 2013. Therefore, the Prosecution's supplementary

¹⁶ ICC-01/14-01/18-T-008-CONF-ENG ET, pp. 97-99.

¹⁷ Prosecution Response, para. 8.

¹⁸ ICC-01/14-01/18-T-008-CONF-ENG ET, pp.97-99.

¹⁹ *Ibid.*

²⁰ Prosecution Response, para. 9 footnote 21.

²¹ Prosecution Response, para. 9, footnotes 22-26.

submissions regarding Mr Ngaïssona's presence in Cameroon completely miss the point in proving the alleged common plan to regain power. Further, the [REDACTED] used to support these alleged facts regarding Mr Ngaïssona's presence are not on the Prosecution's list of evidence. These additional observations contravene the Chamber's order which specifically stated that the Prosecution must refer to specific items of evidence supporting any allegation.

17. The remaining Prosecution additional submissions include references to two witness statements, and two documents drawn by investigatory bodies.²² With respect to the UN analytical document and the CAR Public Prosecutor's introductory brief, the Defence submits that it is the duty of the Prosecution to investigate the crimes charged. It cannot delegate this responsibility to another investigatory body. The two items consist of allegations which do not refer to specific items of evidence, and therefore are devoid of any probative value. Regarding the two witnesses the Prosecution cites, the Defence notes that the Prosecution again refers to [REDACTED]. As shown by the Defence in its oral submissions, [REDACTED] admits that he never attended a meeting between Mr Ngaïssona or any of the alleged members of Mr Bozizé's supposed inner circle.²³ His evidence lacks significant details and often is based on hearsay.²⁴

18. The Prosecution in its additional submissions also makes reference to [REDACTED]. [REDACTED] is a [REDACTED] witness with no [REDACTED]. The portion cited by the Prosecution of the statement provides that Mr Ngaïssona allegedly gave an order to attack Muslims at a meeting that preceded the alleged 5 December attack. The witness was not present at this meeting; he learned the information from a source whose name is redacted under the category A.6.1. The Defence submits that given the Prosecution is relying on this information to establish Mr Ngaïssona participation in the conception of the strategic common plan, it should be accorded minimal probative value for the following reasons (1) it is indirect anonymous hearsay evidence from a redacted source, and (2) the Prosecution has not provided any other evidence to corroborate that such an order was given by Mr Ngaïssona. While there may be a need for the Prosecution to protect its sources, such a need must be balanced against Mr Ngaïssona's fundamental right under Article 61(6) to confront

²² Prosecution Response, para. 10, footnotes 27-29

²³ CAR-OTP-2061-1534 page 1542, para. 48.

²⁴ See [REDACTED], CAR-OTP-2061-1534-R01, at 1551, [REDACTED]: CAR-OTP-2061-1534-R01, at 1550-1552, 1555, 1558-1559, 1563, paras 104, 109-110, 112, 115-118, 135, 155-156, 187.

and test the evidence against him. With the source's name being redacted, Mr Ngaïssona is not able to avail himself of this right, and therefore the Chamber should not take into account this statement for the purposes of proving Mr Ngaïssona's conduct at this alleged meeting. Given that the statement is anonymous hearsay that is uncorroborated, according probative value to this statement would be substantially outweighed by the prejudice caused to Mr Ngaïssona. Moreover, there is Prosecution evidence that is inconsistent with the allegation that Mr Ngaïssona was part of a common plan to reinstate Mr Bozizé in power. In fact, according to the Prosecution's evidence Mr Ngaïssona would have allegedly said in early 2014 that it was a grave fundamental error to reinstate President Bozizé.²⁵

19. Due to its inability to show Mr Ngaïssona's participation in the conception of a common plan with contemporaneous evidence, the Prosecution argues that this can be proved by concerted action that occurred between the alleged co-perpetrators. The Prosecution fails to substantiate the concerted nature of the purported actions of [REDACTED] and the other alleged members of the common plan and that Mr Ngaïssona made a "coordinated essential contribution" resulting in the charged crimes.²⁶ Indeed, "participation in the commission of a crime without co-ordination with one's co-perpetrators falls outside the scope of co-perpetration within the meaning of article 25(3)(a) of the Statute".²⁷ The Defence has demonstrated how the Prosecution has failed to show that Mr Ngaïssona coordinated with [REDACTED].²⁸

20. Moreover, the Prosecution has not shown that Mr Ngaïssona had the requisite knowledge and intent required under Article 25(3)(a) of the Statute. More specifically, the Prosecution has failed to show that there are substantial grounds to believe that, i) *first*, that Mr Ngaïssona meant to participate in the common plan resulting in the charged crimes and that he carried out his actions either with the purposeful intent to crime the crime or that he was aware that the crime was committed in the ordinary course of events;²⁹ ii) *second*, that Mr Ngaïssona was mutually "aware of the risk that implementing the common plan (...) will result in the

²⁵ CAR-OTP-2001-4818, page 4819. There is other evidence that shows that Mr Ngaïssona did not agree with reinstating Mr Bozizé. CAR-OTP-2027-2290, at 2299, para 54-56

²⁶ Prosecutor v. Lubanga, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803, para. 345.

²⁷ Prosecutor v. Lubanga, Decision on the Confirmation of charges, 7 February 2007, ICC-01/04-01/06-803, para. 343.

²⁸ See Defence Observations. Section II.c-d.

²⁹ Prosecutor v. Gbagbo, Decision on the confirmation of charges, 12 June 2014, ICC-02/11-01/11-656-Red, paras 235-6.

commission of the crime” and that he would “accept such an outcome”³⁰ to the standard of “virtual certainty”;³¹ and, iii) *third*, that Mr Ngaïssona was aware of the factual circumstances that would allow him to exercise joint control over the crime.³² This third element requires that the Prosecution must prove that Mr Ngaïssona was aware of his essential role in the furtherance of the common plan and of his ability to frustrate its execution by refusing to participate in the plan.³³ The Prosecution’s arguments repeated and unsubstantiated assertions in relation to Mr Ngaïssona’s alleged knowledge and intent for the charged crimes under Article 25(3)(a), including that Mr Ngaïssona must have known “of the group’s propensity for violence and motivation to exact revenge against the Muslim population” based on his “involvement in the Anti-Balaka movement from its inception and his position in it”,³⁴ or that Mr Ngaïssona “knew and actively communicated with Comzones in the field,”³⁵ do not satisfy the subjective elements above.

21. The confirmation of charges procedure in the *Abu Garda* is instructive to the case at hand. In that case, the Prosecution had asked the Chamber to infer from the circumstantial evidence, the existence of a common plan involving the suspect, including subsequent action on his part. Similarly to the instant case, the Prosecution had argued that the suspect’s involvement in the alleged meetings were indicative of the existence of a common plan. Following a thorough review of the Prosecution evidence, the Chamber found that the witness testimonies did not definitively place Mr Abu Garda at the meetings where the common plan would have been conceived. The Chamber also found that Mr Abu Garda’s participation in an alleged second meeting was based on the uncorroborated evidence of an anonymous witness, including the statements of those witnesses who allegedly participated

³⁰ Prosecutor v. Lubanga, Decision on the confirmation of charges, 7 February 2007, ICC-01/04-01/06-803, para. 344.

³¹ Prosecutor v. Lubanga, Public redacted document Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, para. 447; Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 370.

³² Prosecutor v. Ntaganda, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, para. 121; Prosecutor v. Katanga, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436, para. 1396; Prosecutor v. Lubanga, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 1013.

³³ Prosecutor v. Lubanga, Decision on the confirmation of charges, 7 February 2007, ICC-01/04-01/06-803, para. 367.

³⁴ DCC, para. 173.

³⁵ Prosecution’s Response, para. 47.

in the attack.³⁶ These findings led the Chamber ultimately to decline confirming the charges against Mr Abu Garda.³⁷

22. Here, like in *Abu Garda*, the Prosecution has also failed to place Mr Ngaïssona in a specific meeting where the alleged strategic common plan to regain power through the instrumentalization of the Anti-Balaka to commit crimes was conceived. Like in *Abu Garda*, the Prosecution relies on uncorroborated hearsay evidence to substantiate that Mr Ngaïssona allegedly gave an order to attack Muslims prior to the 5 December attack.³⁸ Like in *Abu Garda*, this evidence is insufficient to establish substantial grounds to believe participation in a meeting where the common plan was conceived.
23. Moreover, in its Response, the Prosecution conflates the modes of liability of direct and indirect co-perpetration, which are distinct modes of criminal responsibility.³⁹ Indirect co-perpetration, which covers situations where crimes are being committed *through* another person via an organization, reflects an organizational variant of the “control theory” upon which *direct* co-perpetration is grounded.⁴⁰ In contrast, direct co-perpetration entails a type of commission whereby the concerted crime is physically perpetrated by at least one of the co-perpetrators pursuant to a common plan.⁴¹
24. In other words, both types of modes of liability require distinct elements which may justify

³⁶ Prosecutor v. Abu Garda, Public Redacted Decision on confirmation of charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 177.

³⁷ Prosecutor v. Abu Garda, Public Redacted Decision on confirmation of charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 236.

³⁸ The Prosecution in its additional submissions cites [REDACTED]. The insufficiency of this evidence is substantiated by the Defence in the present observations. Defence Observations, Section II.c.

³⁹ Prosecutor v. Katanga, Public Redacted Decision on confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 494.

⁴⁰ Indirect co-perpetration is based on Claus Roxin’s theory of Organisationsherrschaft whereas direct perpetration is based on his “Tatherrschaft, also known as the control theory. It was first established in the ICTY Stakic case, and later in other cases, See, Prosecutor v. Katanga and Ngudjolo, Public Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 492; Prosecutor v. Gbagbo and Blé Goudé, Reasons of Geoffrey Henderson, 16 July 2019, ICC-02/11-01/15-1263-Conf-AnxB, para. 1922; See also J de Hemptinne, R Roth and E van Sliedregt (eds.), Modes of Liability in International Criminal Law, Cambridge University Press (2019), Modes of Liability in International Criminal Law, pp. 111, 114.

⁴¹ As expressed in the *Ongwen* confirmation of charges: [I]ndirect co-perpetration’ or ‘joint indirect perpetration’ ... Still rests on the notion of reciprocal imputation of coordinated actions performed by each co-perpetrator. *The only difference with ‘direct’ co-perpetration is that the objective elements of the crime are executed by other persons who are utilized by the co-perpetrators for the commission of the crime.* [emphasis added] Prosecutor v. Ongwen, Decision on the Confirmation of the charges, 23 March 2016, ICC-02/04-01/15-422-Red, paras 38-39. See also J de Hemptinne, R Roth and E van Sliedregt (eds.), Modes of Liability in International Criminal Law, Cambridge University Press (2019), p. 98.

mutual attribution.⁴² In the case at hand, the Prosecution has failed to demonstrate that Mr Ngaïssona participated in the alleged common plan, that he had the required three *mens rea* elements, and that at least one member of the common plan directly perpetrated the alleged crimes pursuant to the common plan.

d. The Prosecution has failed to establish that the Cameroon, France, Zongo, and Kalangoi groups coordinated with each other

25. In order to show that there was coordination between the alleged Cameroon, France, Zongo and Kalangoi groups which included Mr Ngaïssona, the Prosecution makes additional submissions with respect to the relationship between [REDACTED], [REDACTED] and Mr Ngaïssona as well as submissions regarding Mr Ngaïssona's alleged permission to stay in France when FROCCA was allegedly created.⁴³ Further, the Prosecution submits that a common plan is not dependent on telephone contacts and thus, the Defence submissions are not dispositive. The Prosecution misconstrues the Defence submissions. It is the Prosecution which links Mr Ngaïssona to the ZONGO group through telephone contacts.⁴⁴ Paragraph 39 of the DCC is the only paragraph that mentions Mr Ngaïssona's connection to the ZONGO group. Therefore, for the Prosecution to argue that telephone contacts are not dispositive, does not dispose of its obligation to show how Mr Ngaïssona was linked to this group. Since the Prosecution has failed to show that Mr Ngaïssona participated in the conception of the strategic common plan, the actions of other individuals such as [REDACTED] may not be imputed to him.

26. In its additional submissions, the Prosecution asserts that the coordination between Mr Ngaïssona, [REDACTED] and [REDACTED] can be inferred from the alleged close relationship they had both prior 14 January 2014 and that such relationship continued after 14 January 2014.⁴⁵ With respect to the alleged close contacts prior to 14 January 2014, many of the submissions raised by the Prosecution were already raised and shown to be insufficient evidence by the Defence during its oral submissions.⁴⁶ With respect to [REDACTED], the

⁴² Prosecutor v. Gbagbo and Blé Goudé, Reasons of Geoffrey Henderson, 16 July 2019, ICC-02/11-01/15-1263-Conf-AnxB, para. 1922.

⁴³ See Prosecution Response, paras 15-19.

⁴⁴ DCC, para. 39.

⁴⁵ Prosecution Response, paras 16-17.

⁴⁶ This is the case for the submission relating to Mr Ngaïssona being part of FROCCA, and having telephone contacts [REDACTED]. Prosecution Response, para 16 footnote 40 and 43. See ICC-01/14-01/18-T-008-CONF-ENG ET pp. 104-105

Defence notes that the Prosecution cites two witnesses, namely [REDACTED] and [REDACTED] for the allegation that Mr Ngaïssona [REDACTED] while in Cameroon. [REDACTED] statement with respect to this allegation constitutes hearsay. The other statement used in support of this allegation is anonymous hearsay, and thus cannot be said to corroborate [REDACTED] since the source of the information may be the same for the two witnesses.⁴⁷ The other items of evidence cited by the Prosecution to show a close relationship between Mr Ngaïssona and [REDACTED] at most show that the two individuals knew each other while they were in Cameroon, but in no way suggest a close relationship.⁴⁸ Moreover, even *assuming arguendo* that [REDACTED] and Mr Ngaïssona [REDACTED], it does not show how the two were conspiring to implement a common plan. As one Prosecution witness previously said there were many Central Africans that were in exile in Cameroon together, and that had a pre-existing relationship.⁴⁹ It is hardly indicative of a common plan to maintain Mr Bozizé in power.

27. With respect to the evidence cited in footnotes 44-50, the Defence notes that none of the evidence cited refers to Mr Ngaïssona, and therefore, it cannot be used to show a relationship triangle between Mr Ngaïssona, [REDACTED] and [REDACTED]. Instead, the evidence relates to the activities and acts of [REDACTED] The Prosecution still must produce evidence to show that [REDACTED]'s acts were done on behalf of the alleged inner circle that included Mr Ngaïssona and that he was aware of such acts.⁵⁰

28. While the evidence the Prosecution cites in footnote 51 does relate to Mr Ngaïssona, the Defence submits that it is unclear from the [REDACTED] statement that he correctly recalled

⁴⁷ The Defence in its submission referred to [REDACTED] who provided tangible direct and concrete evidence that shows that Mr Ngaïssona did not [REDACTED]. [REDACTED], CAR-OTP-2078-0059 at 0069-0070 paras 61-65. *See* Defence oral submissions. ICC-01/14-01/18-T-008-CONF-ENG ET p.94

⁴⁸ [REDACTED], CAR-OTP-2061-1534, at 1552, 1558, paras.113, 152: (provides no information about the nature of the relationship between Mr Ngaïssona and [REDACTED]); [REDACTED]: CAR-OTP-2025-0324, at 0337, para.87 (referring to seeing [REDACTED] when the witness visited Mr Ngaïssona); [REDACTED]: CAR-OTP-2062-0039, at 0042, para.23 (referring to seeing [REDACTED] when the witness visited Mr Ngaïssona); [REDACTED], CAR-OTP-2090-0561, at 0572, para.75 (affirming that Mr Ngaïssona and [REDACTED] were together in Cameroon). The Prosecution again cites [REDACTED] which as submitted by the Defence ascribes an incorrect interpretation to the Witness transcript. *See* Defence Observations, para. 73, footnote 135.

⁴⁹ [REDACTED]: CAR-OTP-2078-0059, at 0070, para.65. [REDACTED] also explains in his statement that he would spontaneously meet various Central African FACA members while he was in exile in Cameroon since they frequented the same places. CAR-OTP-2074-2580-R01, at 2585.

⁵⁰ *The Prosecutor v. Ruto and Sang*, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11-2027-Red-Corr, paras 69-71.

the date of the [REDACTED]. The witness seems to hesitate when he answers that [REDACTED].⁵¹ Moreover, the Defence was unable to locate [REDACTED].⁵²

29. The Prosecution has similarly failed to show that there are substantial grounds to believe that the relationship triangle between [REDACTED], [REDACTED] and Mr Ngaïssona continued after 14 January 2014. The Prosecution fails to meet its evidentiary burden since the evidence either is too ambiguous for the Chamber to draw the inference the Prosecution advances or the evidence demonstrates that there was disaccord between Mr Ngaïssona, [REDACTED] and [REDACTED]. The evidence the Prosecution cites in support of [REDACTED] [REDACTED] does not pass muster. In the DCC, the Prosecution cited this same evidence in support of the allegation that [REDACTED] saw Mr Ngaïssona almost daily.⁵³ Here, the Prosecution stretches the interpretation of [REDACTED] statement beyond what can be reasonable inferred from it.⁵⁴

30. The evidence the Prosecution cites in footnote 53 and footnote 55 undermines the Prosecution's arguments with respect to Mr Ngaïssona, [REDACTED] and [REDACTED] being part of an alleged inner circle whose strategic common plan was to reinstate as President Mr Bozizé. While the [REDACTED]. Therefore, they chose Mr Ngaïssona as their national coordinator because they did not want to be perceived as pro-Bozizé.⁵⁵ This shows that [REDACTED] and Mr Ngaïssona were not in agreement regarding how the Anti-Balaka movement should evolve once Mr Djotodia was no longer in power.⁵⁶ In the same vein, in footnote 55, the Prosecution cites evidence that shows a split between Mr Ngaïssona and [REDACTED] when [REDACTED] [REDACTED].⁵⁷ The other evidence the Prosecution cites is not relevant for showing a common plan, but rather an attempt at organizing the Anti-Balaka movement, in which Mr Ngaïssona participated in the hope that it would contribute to

⁵¹ [REDACTED], CAR-OTP-2072-1849, at 1875-1876, lns 885-920.

⁵² CAR-OTP-2061-1441.

⁵³ ICC-01/14-01/18-282-Conf-AnxB1, p. 36, para 72: "*From then on NGAISSONA met with, or contacted [REDACTED] and [REDACTED] almost daily.*"

⁵⁴ Nowhere does [REDACTED] state that [REDACTED]. The witness refers to a meeting that allegedly took place in Mr Ngaïssona's father's house. He states: "NGAISSONA [REDACTED]. [REDACTED] [REDACTED] [REDACTED]." See [REDACTED]: CAR-OTP-2090-0561, at 0580, para.149

⁵⁵ CAR-OTP-2027-2308, at 2299, 2308, paras 54, 115⁵⁶ [REDACTED]: CAR-OTP-2090-0002-R01, at 0011, paras 40-41; [REDACTED]: CAR-OTP-2025-0324-R03, at 0338, para. 93; [REDACTED]: CAR-OTP-2115-0239-R01, at 0261, paras 103-105

⁵⁶ [REDACTED]: CAR-OTP-2090-0002-R01, at 0011, paras 40-41; [REDACTED]: CAR-OTP-2025-0324-R03, at 0338, para. 93; [REDACTED]: CAR-OTP-2115-0239-R01, at 0261, paras 103-105

⁵⁷ [REDACTED]: CAR-OTP-2072-1541-R01, at 1544-1545, lns74-124

the DDR process.⁵⁸ With respect to the Defence submissions regarding the lack of evidence to suggest the existence of a France group in the DCC, the Prosecution accuses the Defence of: (1) making false statements to the Court,⁵⁹ (2) withholding information⁶⁰ and (3) making misleading arguments.⁶¹ The Defence respectfully reminds the Prosecution of its submissions regarding Mr Ngaïssona's presence in France in August 2013. The Defence submitted:

"It is forensic evidence that refutes the theory of the OTP, Mr President, and we refer here to document CAR-OTP-2098-0293 at page 0301. The visa you find there was only valid to March 2013, so it's, with all due respect, a nonsense story that Mr Ngaïssona was in France to create the France group."⁶²

31. The Defence submits the following facts to the Chamber. To this day, the Prosecution has disclosed two passports belonging to Mr Ngaïssona, his standard passport and his diplomatic passport.⁶³ The Defence is not in possession of any passport belonging to Mr Ngaïssona, while any diplomatic passport had to be returned to the State after leaving office as minister. The Prosecutor disclosed on 1 October 2019 the two items of evidence it relies upon to substantiate that Mr Ngaïssona had a *carte de séjour* in the summer of 2013. The Defence therefore saw for the first time the [REDACTED]⁶⁴ and the [REDACTED],⁶⁵ one week after it had made its submissions. Therefore, the Defence was not and could not materially have been apprised of their content.

32. The Defence made its submissions regarding the lack of a visa on the basis of the evidence submitted by the Prosecution. The document CAR-OTP-2017-0198, which the Prosecution cites and which the Defence did have access to, is not on its face a travel document. It is a single page document containing the photograph and the electronic signature of Mr Ngaïssona, and has very little information. While the document provides the alleged passport number of Mr Ngaïssona as [REDACTED], this is the sole ascertainable information provided about a potential third passport. Therefore, it was not incumbent on the Defence to investigate this matter. By making such accusations, the Prosecution impermissibly reverses the burden of proof, which is prohibited under Article 66 of the Rome Statute. The onus is on the Prosecution to prove that there are substantial grounds to believe that Mr Ngaïssona

⁵⁸ Prosecution response, footnotes 54-58. ICC-01/14-01/18-T-009-CONF-ENG ET, pp. 5-8

⁵⁹ Prosecution Response, para. 14.

⁶⁰ Prosecution Response, para. 18.

⁶¹ Prosecution Response, para. 19.

⁶² T-008-CONF-ENG-ET, pp 105-106.

⁶³ CAR-OTP-2098-0293, CAR-OTP-2098-0312

⁶⁴ CAR-OTP-2117-0389.

⁶⁵ CAR-OTP-2115-0462.

committed the crimes charged. In a case where the Prosecution alleges that various groups in various locations were communicating and coordinating with one another, it is clear that Mr Ngaïssona's location would be paramount to the case, and thus locating or obtaining information about a third passport should have been a priority for the Prosecution. *Assuming arguendo* that the Chamber were to allow the Prosecution to add the [REDACTED] and the [REDACTED] to its list of evidence, these items still do not provide objective and tangible evidence that Mr Ngaïssona was one of the founding members of the FROCCA group that was created in France.

33. Further, the Prosecution has not provided any further submissions to substantiate that Mr Ngaïssona would have created the group. Therefore, it has failed to rebut the Defence's arguments. The Defence notes that the Prosecution does make the submission that by virtue of the fact that [REDACTED] was the [REDACTED] of the Anti-Balaka he would have been familiar with the group. This submission is belied by the evidence. The witness did not correctly recall the name of the group and speculated that Mr Ngaïssona created it along with other individuals.⁶⁶ The position of [REDACTED] and his unfamiliarity with the group bolsters the Defence's submissions, namely that the Anti-Balaka was a movement that included many groups that did not coordinate with one another.

III. MR NGAÏSSONA WAS A PEACE COORDINATOR AND DID NOT ARM, PROVIDE MONEY TO, OR TRAIN THE ANTI-BALAKA

a. The Prosecution has failed to establish that Mr Ngaïssona made essential contributions to the common plan

34. The Prosecution's assertion that the Defence's challenge of a number of Mr Ngaïssona's alleged contributions, namely with respect to the provision of weapons, arming, financing and training "do not dispel the existence of the strategic common plan or refute [Mr] Ngaïssona's essential role in it", given that he may be held accountable "through mutual attribution",⁶⁷ is unpersuasive. Mutual attribution can only be based on a division of essential tasks ascribed to the co-perpetrators in a common plan – meaning that without Mr Ngaïssona's contributions, the crimes would not have been committed – as well as mutual

⁶⁶ [REDACTED], CAR-OTP-2080-1678-R01, at 1707, lns 985-1011.

⁶⁷ Prosecution Response, paras 20-24.

awareness, as one of the several legal criteria for mens rea which the Prosecution must demonstrate.⁶⁸

35. For charges to be confirmed against Mr Ngaïssona as a direct co-perpetrator, the Prosecution must first show that Mr Ngaïssona's alleged role and activities amounted to an *essential* contribution, as consistently and invariably recognized by the Court, without which the commission of the offence(s) would not be possible".⁶⁹ Only those to whom "essential" tasks have been assigned – and who consequently have the power to frustrate the commission of the offence by not performing their task – and that have the requisite mens rea,⁷⁰ can be said to have joint control over an offence.⁷¹

36. The Defence further notes that the Prosecution conflates the modes of liability under Article 25(3)(a) – a form of co-perpetration based on joint control ascribing principal liability for the (group) commission of the crime⁷² – and 25(3)(d) – a form of accessorial liability, – which have distinct objective (actus reus) and subjective (mens rea) requirements.⁷³ One cannot be simply subsumed in the other. For instance, the mens rea elements of both modes of liability diverge: as described above, co-perpetration requires mutual awareness and mutual acceptance that the execution of the common plan by the co-perpetrators will result

⁶⁸ Prosecutor v. Lubanga, Decision on the Confirmation of charges, 7 February 2007, ICC-01/04-01/06-803, paras 342, 346-347; See Defence Observations, Section II c).

⁶⁹ Prosecutor v. Lubanga, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 999; Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 350.

⁷⁰ Defence Observations, Section II c)

⁷¹ Prosecutor v. Lubanga, Decision on the Confirmation of charges, 7 February 2007, ICC-01/04-01/06-803, para. 346 ss.; Prosecutor v. Lubanga, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, para. 469; Prosecutor v. Ongwen, Decision on the Confirmation of charges, 23 March 2016, ICC-02/04-01/15-422-Red, para. 38; Prosecutor v. Al Mahdi, Public Redacted Decision on confirmation of charges, 24 March 2016, ICC-01/12-01/15-84-Red, para 24; Prosecutor v. Katanga and Ngudjolo, Decision on the Confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras 524-525; See Defence Observations, Section II c).

⁷² Prosecutor v. Lubanga, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, para. 462

⁷³ Prosecutor v. Katanga, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436, para 1618; Prosecutor v. Mbarushimana, Decision on the Confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 278. See Prosecution Response, para. 21; DCC, para. 627.

in the commission of the crime,⁷⁴ whereas under Article 25(3)(d), the accused must have the knowledge and the intent of the group to commit the crime, and further, must intend to contribute to it.⁷⁵

37. In the Prosecution Response, the Prosecution argues that “the Defence’s selective submissions on the evidence presented regarding the Anti-Balaka’s arming is again misleading”,⁷⁶ but it remains unable to prove such an allegation. The additional submissions of the Prosecution on this point are indeed limited to a mere recall of the DCC,⁷⁷ to which the Defence has already responded during the Confirmation Hearing.

38. The Prosecution also seems to specifically refer to [REDACTED] to substantiate that: “[Mr] NGAÏSSONA, together with the National Coordination, addressed this need, providing money for weapons and ammunition.”⁷⁸

39. However, when examining the evidence related to [REDACTED] in the DCC, nothing allows drawing such a conclusion. In paragraphs 84 and 85 of the DCC, [REDACTED] is mentioned once⁷⁹ to support the allegation that Mr Ngaïssona provided money for weapons and ammunition. More specifically, two paragraphs of his statement are referenced in the footnote, namely paragraphs 18 and 41.⁸⁰

40. Paragraph 18 of [REDACTED] statement reads as follows: “[...] I had a hunting rifle and we made our hunting cartridges out of ammunition that we had seized from the Seleka we attacked.”⁸¹

⁷⁴ Prosecutor v. Lubanga, Decision on the Confirmation of charges, 7 February 2007, ICC-01/04-01/06-803, paras 349, 361, 366. Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para 351; Prosecution v. Abu Garda, Decision on the confirmation of charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 161; Prosecutor v. Banda and Jerbo, Corrigendum of the “Decision on the confirmation of charges”, 7 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 150-151; Prosecutor v. Gbagbo, Decision on the Confirmation of charges, 8 February 2010, ICC-02/05-02/09-243-Red, paras 230, 236; Prosecutor v. Lubanga, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04/01/06-2842, paras 1013, 1018.

⁷⁵ Prosecutor v. Germain Katanga, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436, para. 1638.

⁷⁶ Prosecution Response, para. 22.

⁷⁷ DCC, paras 84-85, 152-153.

⁷⁸ Prosecution Response, para. 22.

⁷⁹ DCC, para. 85, footnote 204.

⁸⁰ “[REDACTED] CAR-OTP-2031-0241-R01, at 0244, 0248, paras.18, 41”, as mentioned in DCC, para. 85, footnote 204.

⁸¹ CAR-OTP-2031-0241-R01, at 0244, para. 18. Emphasis added.

41. Going even further, paragraph 41 of [REDACTED] reinforces the idea that the Witness and his group fought with basic weapons and ammunition, the more so as the Seleka's weapons were too complicated to operate for him.⁸²
42. Therefore, far from “*demonstrat[ing] the importance and impact of the contributions made through the National Coordination and [Mr] NGAÏSSONA's personal contributions to the Anti-Balaka's military capacity*”,⁸³ the cited witness actually reinforces the fact that Anti-Balakas fought with basic and rudimentary weapons, let alone that the witness never made any mention of weapons provided to him or his group by Mr Ngaïssona and/or the Coordination.
43. The Prosecution infers that since the Anti-Balakas fighting used basic and rudimentary weapons, thus they needed a contribution from others to purchase or obtain more *sophisticated* weapons. However, this inference remains unsubstantiated and the existence of witnesses stating, as recalled by the Defence during the Confirmation Hearing, that Anti-Balakas did not receive weapons from the Coordination cannot be reasonably disregarded.⁸⁴
44. Besides, the Defence notes that the Prosecution sees no need to expand on the evidence presented by the Defence on the fact that Mr Ngaïssona did not finance criminal activities.⁸⁵ Therefore, the Defence notes that the Prosecution continues to disregard the four witnesses that directly contradict the theory that Mr Ngaïssona allegedly financed criminal activities carried out by Anti-Balakas.⁸⁶

b. The Prosecution has failed to establish that Mr Ngaïssona's speeches against foreign intervention amounted to anti-Muslim rhetoric

⁸² CAR-OTP-2031-0241-R01, at 0248, para. 41: “We didn't have weapons, just stones, wood sticks and makeshift fire weapons [REDACTED], 12 calibre bullets and fetishes. On the front line we fought with makeshift traditional weapons. We seized weapons from the Seleka when we could, but their automatic weapons were too complicated to operate and thus would remain in the back. We used cartridges and parts to make our own ammunition with fetishes inside and weapons.”

⁸³ Prosecution Response, para. 22.

⁸⁴ CAR-OTP-2059-1433, at 1448, CAR-OTP-2027-2290-R01, para. 75, CAR-OTP-2078-0059, at 0085, para. 159, CAR-OTP-2031-0241, at 0250, para. 54, CAR-OTP-2041-0741, para. 98, CAR-OTP-2046-0603-R01, at 0617, para. 84, CAR-OTP-2070-0871-R01, p.0873, at 0873-0874, l.60-80 ; See also [REDACTED]: CAR-OTP-2048-0171, at 0183-0184, para. 73

⁸⁵ Prosecution Response, para. 23.

⁸⁶ [REDACTED]: CAR-OTP-2045-0048-R02, at 0056, para.51, [REDACTED]: CAR-OTP-2093-0010-R01, at 0018, 0023, paras.42-44, 71, [REDACTED]: CAR-OTP-2048-0171-R01, at 0189, para.106, [REDACTED]: CAR-OTP-2078-0059, at 0069-0070, paras 61-62.

45. At the outset, the Prosecution reiterates that the speech given on 4 January 2013⁸⁷ was made on behalf of Mr Ngaïssona,⁸⁸ for the sole reason that the speaker introduced himself as giving a call on his behalf. However, as already objected to during the *Confirmation* Hearing, the Defence submits that speaking on behalf of an individual is a fact that must be proven and, as of today, the Prosecution has failed to prove that Mr Ngaïssona instructed the unidentified speaker to pronounce the speech on his behalf.
46. The Prosecution argues that the evaluation of Mr Ngaïssona's speeches should take into account three additional elements presented in the Prosecution Response.⁸⁹
47. *First*, the Prosecution contends that by knowing that there were CAR nationals among the Seleka, Mr Ngaïssona, when referring to Central Africans in his speeches, "*distinguish[ed] even the Central African Muslim population from "real Central Africans"*."⁹⁰
48. However, the Defence submits that, at best, the evidence referenced by the Prosecution in support of this allegation is not tangible, at worst, it directly contradicts the allegation. Out of four items provided as supporting evidence,⁹¹ three are unreliable. One item is a speech given by François Bozizé which, as such, cannot be attributed to Mr Ngaïssona.⁹² A second item of evidence is an audio extract entirely in Sango, provided without transcript and without translation and seemingly from an unknown speaker.⁹³ The third item of evidence is another audio excerpt entirely in Sango for which the Prosecution only provided a summary and not a translation.⁹⁴ This summary cannot be deemed to have any legal value since it has been prepared by the Prosecution. The Defence still notes that, in the summary, Mr Ngaïssona is not reported to be heard on the excerpt.
49. Regarding the only reliable and relevant item of evidence mentioned by the Prosecution in support of the allegation,⁹⁵ Mr Ngaïssona's words actually demonstrate the contrary of the

⁸⁷ CAR-OTP-2000-0680, with transcript CAR-OTP-2087-9789 and translation CAR-OTP-2087-9863.

⁸⁸ Prosecution Response, para. 27, footnote 89: "*See CAR-OTP-2000-0680, and its transcript CAR-OTP-2087-9789 and translation CAR-OTP-2087-9863, at 9865, lns.3-4: "nous lançons cet appel au nom de Patrice-Edouard NGAÏSSONA"*."

⁸⁹ Prosecution Response, paras. 27-30.

⁹⁰ Prosecution Response, para. 28.

⁹¹ *Ibid.*, footnote 92.

⁹² *Ibid.*, CAR-OTP-2101-0462, at 0462, 0465-0466.

⁹³ *Ibid.*, CAR-OTP-2042-2107, from [00:00:00] to [00:06:30].

⁹⁴ *Ibid.*, CAR-OTP-2000-0724, from [00:00:00] to [00:17:01] and its summary translation CAR-OTP-2008-0253.

⁹⁵ *Ibid.*, CAR-OTP-2042-0976 and its transcript CAR-OTP-2107-1473.

Prosecution's theory according to which he would have distinguished between Muslims and "real" Central Africans:

"[...] on doit soutenir le dialogue inclusif, on ne doit pas se déchirer et dire non à la guerre civile, oui au dialogue, oui à la réconciliation nationale, et que on interpelle également les opposants. Que tu sois RDC, MLPC, UFDR ... la patrie nous interpelle tous. Nous faisons ça, ce n'est pas pour parler en mal de qui que ce soit, mais soutenir notre Chef d'Etat. Nous avons un seul pays, une seule patrie, un seul chef, qui est le Président de la République [...]."⁹⁶

50. As emphasized below, far from distinguishing amongst the Central Africans, Mr Ngaïssona repeatedly called to unity and inclusive dialogue, calling even the opponents to the government.⁹⁷

51. *Second*, the Prosecution again misinterprets the Defence submissions that Mr Ngaïssona's excerpts of speeches were isolated and presented out of their respective contexts in the DCC and during the Confirmation Hearing.⁹⁸ The Defence did not submit that Mr Ngaïssona made speeches that had to be understood and interpreted out of the CAR context at that time. The Defence actually submitted the contrary: that every speech should be read and analyzed in its proper context.⁹⁹ The above-mentioned speech constitutes a salient example of the Prosecution's methodology in this regard. While the Prosecution limits itself to the citation of one specific sentence, to support the allegation that Mr Ngaïssona's speeches were divisive, the examination of the rest of the speech demonstrates exactly the contrary.¹⁰⁰

52. In an attempt to support the same allegation of division amongst Central Africans allegedly instigated by Mr Ngaïssona, the Prosecution relies on several speeches made by François Bozizé and other individuals.¹⁰¹ The Defence submits that these speeches are hence irrelevant to Mr Ngaïssona's acts and conducts and that the Prosecution has not proved to what extent François Bozizé's words should be attributed to Mr Ngaïssona.

⁹⁶ CAR-OTP-2107-1473, at 1474, lns 12-15. Emphasis added; See also CAR-OTP-2107-1473, at 1474, lns 3-5, 7-10.

⁹⁷ CAR-OTP-2107-1473, at 1474, l. 14: "*Que tu sois RDC, MLPC, UFDR ... la patrie nous interpelle tous.*"

⁹⁸ Prosecution Response, para. 29.

⁹⁹ ICC-01/14-01/18-T-009-CONF-ENG ET, pp. 64-70, lns 16-25.

¹⁰⁰ See, by comparison CAR-OTP-2107-1473, at 1474, lns 21-22, as cited in the Prosecution Response, para. 28, and CAR-OTP-2107-1473, at 1474, lns 3-5, 7-10, 12-15, as cited by the Defence in the present Observations.

¹⁰¹ Prosecution Response, para. 29, footnote 93.

53. Moreover, the Prosecution alleges that “*the language used by [REDACTED] and [REDACTED] on behalf of COAC and COCORA (groups with close links to NGAÏSSONA) formed the basis of a formal inquiry by “the Mixed Investigation Commission... in particular for ‘inciting hatred’*”.¹⁰²

54. To substantiate this allegation, the Prosecution mentions as supportive evidence a report prepared by FIDH.¹⁰³ When checking the relevant page mentioned by the Prosecution, the Defence has first noted that, according to the FIDH, [REDACTED] and [REDACTED] respective groups “*were investigated by the Mixed Investigation Commission [...], in particular for “inciting hatred”*”,¹⁰⁴ and not, as alleged by the Prosecution, that their language “*formed the basis of a formal inquiry*”.¹⁰⁵

55. Most importantly, the FIDH report tendered into evidence by the Prosecution in support of this allegation refers to two sources for the information on this inquiry:¹⁰⁶ (i) a press article that does not mention any inquiry related to [REDACTED] and [REDACTED], and (ii) another FIDH Report, entitled “Central African Republic: A country in the hands of Seleka war criminals”.¹⁰⁷ In the latter, mention is made of an “incipient national inquiry commission”,¹⁰⁸ without any reference to either [REDACTED] or [REDACTED], let alone any reference to “hatred speeches” in the Commission’s mandate.¹⁰⁹ In conclusion, not only the Prosecution has completely failed to substantiate this allegation, but it has also failed to substantiate its premise that [REDACTED] and [REDACTED] respective groups had “*close links to [Mr] NGAÏSSONA*”.¹¹⁰

¹⁰² Prosecution Response, para. 29, footnote 94.

¹⁰³ *Ibid.*: “See CAR-OTP-2001-2769, at 2830.”

¹⁰⁴ CAR-OTP-2001-2769, at 2830.

¹⁰⁵ Prosecution Response, para. 29.

¹⁰⁶ CAR-OTP-2001-2769, at 2830, footnote 57 of the report: “57. See FIDH. Central African Republic: A Country’ in the Hands of Seleka War Criminals. September 2013. pp.44 and 45, available at: <http://www.fidh.org/IMG/pdf/rca616a2013basdef.pdf> <http://www.jeuneafrique.com/Article/DEPAFP20130504160002/actualite-afriquecentrafrique-bozize-vise-par-une-enquete-pour-violations-des-droits-de-lhomme.html>.”

¹⁰⁷ That is also registered in the case record as CAR-OTP-2001-2890.

¹⁰⁸ CAR-OTP-2001-2890, at 2934-2935.

¹⁰⁹ *Ibid.*

¹¹⁰ Prosecution Response, para. 29.

56. *Third*, the Prosecution alleges that “*despite [Mr] NGAÏSSONA’s references to peace, his speeches were divisive in practice*”, *excluding Muslims from “his ‘peace march’”*¹¹¹ and promoting fear mongering.

57. In an attempt to substantiate this allegation, the Prosecution exclusively relies upon one item of evidence, a speech, already discussed extensively before the Chamber during the Confirmation Hearing.¹¹² However, as the Prosecution again misinterprets this speech, the Defence is obliged to restore its genuine context and meaning. At the outset, the Prosecution has failed to prove that this speech has been pronounced on behalf of Mr Ngaïssona.¹¹³

58. Assuming *arguendo* that Mr Ngaïssona endorsed this speech, far from excluding any Central Africans, he intended to embrace all the populations of CAR and to praise the Muslims for their actions, as these words show:

“En raison du dialogue qui aura lieu à LIBREVILLE, les fils et filles du pays doivent se lever comme un seul homme; que vous soyez commerçants ou commerçantes, que vous soyez vendeurs ambulants ou à la sauvette, que vous soyez membres des confessions religieuses ou fonctionnaires et agents de l’Etat, vous tous qui exercez différents métiers dans notre pays, rappelez-vous que les musulmans se sont rassemblés pour prier pour la paix dans notre pays;”¹¹⁴

59. More specifically, contrary to the Prosecution’s theory, Mr Ngaïssona has concretely associated Muslim individuals to the peace march planned in the speech:

“[...] Nous tiendrons une réunion avec les proviseurs de tous les lycées [...] sans oublier les établissements scolaires privés comme NEWTECH et BEN RACHID et tous les autres.”¹¹⁵

60. The Ben Rachid Establishment is a Muslim semi-private school in Bangui. Therefore, far from excluding the Muslims from the peace march, Mr Ngaïssona specifically reached out to Muslim organizations.

61. The Defence notes that the Prosecution in its additional submissions regarding the role of COAC and COCORA limits its submissions to evidence showing that these two groups participated in the alleged 5 December attack. However, the Prosecution has not provided,

¹¹¹ Prosecution Response, para. 30.

¹¹² See Prosecution Response, para. 30, footnotes 95-97, citing CAR-OTP-2087-9863.

¹¹³ See Defence Observations, para. 45.

¹¹⁴ CAR-OTP-2087-9863, at 9865, lns 14-19. Emphasis added.

¹¹⁵ CAR-OTP-2087-9863, at 9865, lns 34-40. Emphasis added.

and thus has not been able to provide the Chamber with evidence that proves the allegation of the DCC, namely that those youth mobilized by Mr Ngaïssona participated in the 5 December attack.¹¹⁶ Since the Prosecution has not been able to prove to the requisite standard Mr Ngaïssona's links to COCORA, the alleged actions of this group cannot be imputed to him.

c. The Prosecution has failed to establish that Mr Ngaïssona's speeches had the effect of mobilising the youth

62. At the outset, the Defence firmly opposes the unsubstantiated Prosecution's approach according to which Mr Ngaïssona's alleged influence over the youth and the various ways in which he allegedly exercised it would be "subsidiary facts" that "are not 'material' facts on which the confirmation of charges depends or requiring findings by the Chamber".¹¹⁷ By adopting such an approach, the Prosecution invites the Chamber to disregard highly contentious facts that, contradicting its very narrative, are at the core of the case, which would amount to an abdication of the fact finding mission of the Chamber. The Defence notes, in this regard, that the Prosecution does not submit any precedent in support of its legal analysis of "subsidiary facts". The Defence submits, on the contrary, that the allegations related to Mr Ngaïssona's influence over the youth and the nature of his calls should be addressed by the Chamber as these elements are instrumental to the Prosecution's theory.

63. In essence, the Prosecution alleges that (i) Mr Ngaïssona exercised control over the youth, (ii) used this alleged control to incite hatred against Muslims of CAR and (iii) incited the youth to take up arms to defend the country.¹¹⁸ However, the Prosecution's evidence does not support any of these allegations.

64. To substantiate these allegations, the Prosecution seeks the addition of a speech pronounced by Mr Ngaïssona on 15 March 2013 to its list of evidence.¹¹⁹ The Defence raises several objections related to the content of this speech and the way it is interpreted by the Prosecution, let alone the fact that it has been tendered into evidence by the Prosecution

¹¹⁶ DCC, para. 26 footnote 35.

¹¹⁷ Prosecution Response, para. 32.

¹¹⁸ Prosecution Response, paras 32-38.

¹¹⁹ CAR-OTP-2000-0658 and translation CAR-OTP-2006-0739; See ICC-01/14-01/18-378-Conf, paras 8-12.

almost two month after the filing of their list of evidence and less than two days before the submission of the Defence Observations.

65. At the outset, the Defence, once again, urges the Chamber to consider the speech in its entirety and not only the selective excerpts presented by the Prosecution in the Response.¹²⁰
66. *First*, on 15 March 2013, Mr Ngaïssona, as a Minister of the current government, pronounced an eight-minute speech, in the context of the commemoration of François Bozizé's election in 2003. As such, the format of the speech is marked by solemnity as it contains numerous and sometimes heavy forms of courtesy.¹²¹ In this regard, the Chamber will notice that Mr Ngaïssona does not express any closeness to François Bozizé other than the institutional closeness between a Head of State and one of his ministers.¹²² As the Chamber will also notice, Mr Ngaïssona is not the only speaker on that day and he is only the third reported speaker.¹²³
67. *Second*, regarding the content of the speech, the Defence submits that, once again, the speech only refers to economic and cultural matters. The summary of the speech, as introduced by the journalist, confirms this fact.¹²⁴
68. When reading the full speech, the Chamber will notice that Mr Ngaïssona spoke on behalf of the youth to the extent of his unilateral institutional mandate as Minister of Youth, Sports, Arts and Culture,¹²⁵ which does not mean that the youth, in return, acknowledged him as a representative. Therefore, the Prosecution has failed to prove that he "*himself acknowledged his influence over the youth*".¹²⁶ The Chamber will also notice that the Muslims of CAR are not distinguished from the other CAR citizens as they are not even mentioned in Mr Ngaïssona's speech.

¹²⁰ Prosecution Response, paras 33-34.

¹²¹ See, for example, CAR-OTP-2000-0658 and its transcript CAR-OTP-2006-0661, at 0664, lns 116-122. The Defence will refer to the transcript of the speech CAR-OTP-2006-0661.

¹²² See, for example, CAR-OTP-2006-0661, at 0664, lns 116, 132, 139-141.

¹²³ See, CAR-OTP-2006-0661, at 0662-0664.

¹²⁴ CAR-OTP-2006-0739, at 0743, lns 103-106: "*When it was his turn to speak, the Minister of Youth and Sports, Patrice Edouard NGAÏSSONA, firstly recalled the many initiatives the President of the Republic had put in place in place in support of young people, before repeating his wish to see, in practice, the application of the law on special funds for the development of sport In CENTRAL AFRICA.*"; See also CAR-OTP-2006-0661, at 0664, lns 111-115.

¹²⁵ See, for example, CAR-OTP-2006-0661, at 0664, lns 132-139.

¹²⁶ Prosecution Response, para. 33.

69. Besides, the Chamber will notice that in this speech, Mr Ngaïssona addresses numerous matters, such as the administrative organization, employment of the youth and social inclusion,¹²⁷ cultural actions and their international impact, notably sport results and grants to artists.¹²⁸ Therefore, the Prosecution has failed to prove that these initiatives and the fact to recall them to the public would incite the youth to defend the country through violent means and to incite hatred against the Muslims of CAR.

70. Finally, the Prosecution suggests that, as a result of Mr Ngaïssona's speeches, CAR youth taking refuge in Cameroon were recruited by members of François Bozizé's guards, including [REDACTED].¹²⁹ The Prosecution mentions media articles as its unique evidence for this allegation,¹³⁰ hence failing to prove the very existence of this fact, but most importantly, when reading these articles and in light of the above, it is impossible to find a link between these alleged recruitments and Mr Ngaïssona's speeches.¹³¹

d. The Prosecution has failed to establish that Mr Ngaïssona accepted the position of National General Coordinator unconditionally

71. The Prosecution submits that the Defence's submission that Mr Ngaïssona accepted to be national coordinator on the condition that violence cease is unsubstantiated. However, it is clear from the Defence's submissions that such an inference can be made on the basis of Mr Ngaïssona's acts upon his becoming National Coordinator.¹³²

72. This inference is corroborated by [REDACTED]'s statement that the Prosecution now seeks to have on its list of evidence who expressly states that Mr Ngaïssona wanted all hostilities to cease and that this objective caused tensions with [REDACTED], [REDACTED], [REDACTED].¹³³ The Prosecution's additional submissions do not undermine the

¹²⁷ CAR-OTP-2006-0661, at 0664-0665, lns 136-144.

¹²⁸ CAR-OTP-2006-0661, at 0665, lns 148-167.

¹²⁹ Prosecution Response, para. 38.

¹³⁰ *Ibid.*, footnote 109.

¹³¹ See for example CAR-OTP-2001-4020.

¹³² See e.g. [REDACTED] ([REDACTED]), CAR-OTP-2068-0037-R01, at 0058-0059, paras 102-103, 107-108; [REDACTED], CAR-OTP-2093-0010-R01, at 0026, 0029, paras 88, 89, 107; CAR-OTP-2066-1601-R01, at 1656; CAR-OTP-2108-0050-R01, at 0050-0051; CAR-OTP-2001-5026; [REDACTED], 2094-0593-R01, at 0604, lns 416-423; [REDACTED], CAR-OTP-2025-0324-R02, at 339, para. 98; [REDACTED], CAR-OTP-2107-4580-R01, at 4610; [REDACTED], CAR-OTP-2090-0067-R01, at 0079, para. 69; CAR-OTP-2074-2401-R01, at 2430-2439.

¹³³ ICC-01/14-01/18-322-Conf-Anx1, page 832, item 43. [REDACTED], CAR-OTP-2090-0002, para. 38. The witness further states "NGAISSONA considérait que BOZIZE avait une emprise sur les Anti-Balaka ce qui les menaient à tuer des gens. NGAISSONA ne voulait pas cela, il voulait la paix." para. 41.

Defence's arguments that Mr Ngaïssona accepted to be coordinator conditionally. In support of this submission the Prosecution relies extensively on [REDACTED] evidence in addition to [REDACTED].

73. In the Prosecution Response, [REDACTED] is relied on to show that while in Cameroon, Mr Ngaïssona was the political coordinator of the alleged Anti-Balaka starting in October 2013, and that he became the official coordinator as of January 2014.¹³⁴ [REDACTED]'s evidence does not support these two conclusions that the Prosecution advances, and thus, they are unsubstantiated. First, [REDACTED] does not state that Mr Ngaïssona was the political coordinator of the movement as of October 2013, and never in the passages cited by the Prosecution does he state that the individuals listed in paragraph 15 began organizing the movement in Cameroon.¹³⁵ Therefore, these submissions by the Prosecution should be rejected.

74. Similarly, [REDACTED]'s evidence does not demonstrate that there are substantial grounds to believe that Mr Ngaïssona was officially selected as national coordinator upon his return in Bangui on 14 January 2014. [REDACTED]'s statement rather than showing there was an official designation of Mr Ngaïssona shows that there was a celebration in his neighborhood on the day that he came back from exile to Bangui. He states that everyone from the Boy Rabe neighborhood was there, and that they were applauding his return.¹³⁶ While [REDACTED] does say that there was a meeting to select Mr Ngaïssona, nothing suggests that this was an official meeting, especially since according to [REDACTED] no other decision regarding the structure of the Anti-Balaka was made on that day, and nothing else was discussed during this meeting.¹³⁷ Therefore, rather than supporting the inference that he was chosen as the Anti-Balaka coordinator because of his pre-January 2014 role in exploiting the violence of self defence groups, the evidence suggests that he was selected because of his popularity with the population of Boy Rabe where he had been elected a deputy in 2011. Moreover, the evidence the Prosecution cites with respect to [REDACTED] does not make any mention of Mr Ngaïssona's reaction to having been chosen coordinator. It therefore is irrelevant with respect to the issue of whether he accepted the position with conditions.

¹³⁴ Prosecution Response, para. 15, footnote 38, para. 40, footnote 115.

¹³⁵ [REDACTED]

¹³⁶ [REDACTED], CAR-OTP-2072-1479, at 1481 lns 66-74.

¹³⁷ [REDACTED], CAR-OTP-2072-1479 at 1481, lns 52-63.

75. The Defence’s argument that Mr Ngaïssona “accepted to speak in the name of those groups who had come to ask him to be their voice [...] before the government” is not a mere assertion on its part.¹³⁸ These are the exact words of [REDACTED] who attended that first Comzone meeting on 17 June 2014.¹³⁹ The Prosecution claims that Mr Ngaïssona’s meetings with transition President Samba-Panza “betrayed his political ambitions and not any intention to achieve peace”.¹⁴⁰ [REDACTED]¹⁴¹

76. [REDACTED]¹⁴² [REDACTED]¹⁴³

77. Moreover, any political ambition Mr Ngaïssona may have had in no way undermines the Defence submissions that Mr Ngaïssona sought to achieve peace.

78. As demonstrated by the evidence, Mr Ngaïssona’s alleged aspiration to be part of the reform in his country was clearly motivated by his will to contribute to the DDR process. [REDACTED]¹⁴⁴ [REDACTED]

79. [REDACTED]¹⁴⁵

80. [REDACTED]¹⁴⁶

81. [REDACTED]¹⁴⁷[REDACTED]¹⁴⁸ [REDACTED]¹⁴⁹

82. [REDACTED]¹⁵⁰[REDACTED]¹⁵¹[REDACTED]

¹³⁸ DCC, para. 41.

¹³⁹ [REDACTED], CAR-OTP-2107-4580-R01, at 4610.

¹⁴⁰ Prosecution’s Response, para. 41.

¹⁴¹ Prosecution’s Response, para. 41. ¹⁴²[REDACTED]CAR-OTP-2107-0754-R01, p. 0759, l.186-191 ¹⁴³ CAR-OTP-2107-0754-R01, p. 0760, l.197-199

¹⁴²[REDACTED]CAR-OTP-2107-0754-R01, p. 0759, l.186-191 ¹⁴³ CAR-OTP-2107-0754-R01, p. 0760, l.197-199

¹⁴³ CAR-OTP-2107-0754-R01, p. 0760, l.197-199

¹⁴⁴ CAR-OTP-2107-0784-R01, p. 0795-0796, l.389-406. ¹⁴⁵ CAR-OTP-2107-0754-R01, p. 0763, l.318-324.[REDACTED] ¹⁴⁶ Prosecution Response, para. 42. ¹⁴⁷ CAR-OTP-2107-0754-R01, p. 0767-0768, lns. 472-491. ¹⁴⁸ CAR-OTP-2107-0754-R01, p. 0767-0768, lns. 472-491.

¹⁴⁵CAR-OTP-2107-0754-R01, p. 0763, l.318-324.[REDACTED] ¹⁴⁶ Prosecution Response, para. 42. ¹⁴⁷ CAR-OTP-2107-0754-R01, p. 0767-0768, lns. 472-491. ¹⁴⁸ CAR-OTP-2107-0754-R01, p. 0767-0768, lns. 472-491.

¹⁴⁶ Prosecution Response, para. 42. ¹⁴⁷ CAR-OTP-2107-0754-R01, p. 0767-0768, lns. 472-491. ¹⁴⁸ CAR-OTP-2107-0754-R01, p. 0767-0768, lns. 472-491.

¹⁴⁷ CAR-OTP-2107-0754-R01, p. 0767-0768, lns. 472-491. ¹⁴⁸ CAR-OTP-2107-0754-R01, p. 0767-0768, lns. 472-491.

¹⁴⁸ CAR-OTP-2107-0754-R01, p. 0767-0768, lns. 472-491.

¹⁴⁹ CAR-OTP-2107-0754-R01, p. 0767-0768, lns. 472-491. ¹⁵⁰ Prosecution Response, para. 42. ¹⁵¹ CAR-OTP-2107-0754-R01, p. 0771, l.590-598. ¹⁵² Prosecution Response, para. 43. ¹⁵³ CAR-OTP-2087-9062. ¹⁵⁴

[REDACTED], CAR-OTP-2107-0754, at 0774, lns.710-712. ¹⁵⁵ Prosecution Response, para. 44.

83. [REDACTED]¹⁵²[REDACTED]¹⁵³ [REDACTED]¹⁵⁴

84. In conclusion, the Prosecution's attempts to argue that Mr Ngaïssona's political aspirations as well as the legitimate demands made by the Anti-Balaka to be recognized and included in the peace process, as had been the Seleka, as indicative of his contribution to the common plan,¹⁵⁵ should be dismissed.

e. The Prosecution has not established that the Anti-Balaka Coordination structure was in place before the July 2014 Brazzaville Summit

85. In focusing on the question as to whether Mr Ngaïssona has been designated coordinator of the Anti-Balakas in January 2014, the Prosecution, again, misses the Defence's point. The Defence's point was that *"up until the time of the so-called Pareto and Brazzaville summit and talks in June, July 2014, [when] Mr Ngaïssona started being in touch with some of the Comzones from the provinces to the affect[sic] of coordinating peace. He did at that time [...] not even have precise knowledge of whom these individuals were and certainly did not exercise control over them."*¹⁵⁶ The fact that Mr Ngaïssona may have been chosen as coordinator in January 2014 is not relevant to the Defence's point and does not contradict it, nor does it contradict the evidence showing that the coordination was not functioning effectively in January.¹⁵⁷ The Defence does not make the allegation that Mr Ngaïssona would not have "take[n] up his title" until the General Assembly of 17 June 2014.¹⁵⁸ The Defence simply points to [REDACTED] evidence as being consistent with the fact that it is not until 17 June 2014 that the Comzones from all regions came to Bangui to attend a general assembly during which they officially *chose* Mr Ngaïssona to "speak in their names

¹⁵⁰ Prosecution Response, para. 42. ¹⁵¹ CAR-OTP-2107-0754-R01, p. 0771, l.590-598. ¹⁵² Prosecution Response, para. 43. ¹⁵³ CAR-OTP-2087-9062. ¹⁵⁴ [REDACTED], CAR-OTP-2107-0754, at 0774, lns.710-712. ¹⁵⁵ Prosecution Response, para. 44.

¹⁵¹ CAR-OTP-2107-0754-R01, p. 0771, l.590-598. ¹⁵² Prosecution Response, para. 43. ¹⁵³ CAR-OTP-2087-9062. ¹⁵⁴ [REDACTED], CAR-OTP-2107-0754, at 0774, lns.710-712. ¹⁵⁵ Prosecution Response, para. 44.

¹⁵² Prosecution Response, para. 43. ¹⁵³ CAR-OTP-2087-9062. ¹⁵⁴ [REDACTED], CAR-OTP-2107-0754, at 0774, lns.710-712. ¹⁵⁵ Prosecution Response, para. 44.

¹⁵³ CAR-OTP-2087-9062. ¹⁵⁴ [REDACTED], CAR-OTP-2107-0754, at 0774, lns.710-712. ¹⁵⁵ Prosecution Response, para. 44.

¹⁵⁴ [REDACTED], CAR-OTP-2107-0754, at 0774, lns.710-712. ¹⁵⁵ Prosecution Response, para. 44.

¹⁵⁵ Prosecution Response, para. 44.

¹⁵⁶ T-009-ENG RT, p. 6, lns 2-8.

¹⁵⁷ [REDACTED], CAR-OTP-2046-0603, at 0615, para. 75. See also [REDACTED], CAR-OTP-2072-1479, at 1491-1492, lines 419-458.

¹⁵⁸ Prosecution Response, para. 45.

with the international community”.¹⁵⁹ It is therefore consistent with the initial Defence’s point that before that, even assuming Mr Ngaïssona would have been asked by a few Anti-Balaka chiefs from Bangui to represent their groups before the government and the international organisations in January,¹⁶⁰ Mr Ngaïssona did not have concrete connections with the Comzones from all regions.

86. The media article adduced by the Prosecution is not relevant to showing that the coordination would have been effective in February 2014. Mr Ngaïssona’s alleged claim that he would have been in contact with his representative in each commune is not even a direct quote from him. The probative value of this document is extremely low and insufficient to show a concrete connection between Mr Ngaïssona and the Comzones in the field.

87. The document CAR-OTP-2025-0372¹⁶¹ seems to be [REDACTED]. First, the Prosecution does not adduce any evidence that such proposition, unsigned and only containing Mr Ngaïssona’s signature block, has actually been implemented. Therefore, this document does not support the proposition that the coordination was effective as from February 2014. Second, the areas and commanders mentioned in the breakdown relate exclusively to the city of Bangui. Third, even assuming Mr Ngaïssona would have been aware of the content of that document, knowledge of the names of the Anti-Balaka leaders from Bangui is not indicative of Mr Ngaïssona’s personal knowledge of these individuals and more generally of the Comzones operating throughout the countries, nor of a concrete connection between each of them and Mr Ngaïssona.¹⁶² This can therefore not support the proposition that Mr

¹⁵⁹ [REDACTED], CAR-OTP-2107-4580-R01, at 4606-4614. By deliberately avoiding to cite the excerpt of [REDACTED] establishing that this general assembly occurred on 17 June 2014 as opposed to 17 January 2014, the Prosecution maintains the confusion as to the date of that general assembly, suggesting that [REDACTED] statement corroborates the allegation that Mr Ngaïssona would have been designated as coordinator by an assembly in January 2014. However, the evidence shows that the Assembly that witnesses [REDACTED] and [REDACTED] - CAR-OTP-2061-1534-R01, at 1566, para. 199 - refer to and the meeting in January 2014, assuming it occurred, despite the absence in the record of the case of any minutes of it, are two different events. [REDACTED] knows the Assembly was on 17 June 2014 as [REDACTED]. *See e.g.* CAR-OTP-2001-5026 dated 13 February 2014. Therefore, that Assembly [REDACTED] and [REDACTED] refer to cannot have occurred in January 2014.

¹⁶⁰ CAR-OTP-2101-4059.

¹⁶¹ Prosecution Response, para. 47.

¹⁶² *See, by analogy*, [REDACTED], CAR-OTP-2046-0324-R01, at 0325-0326, lns 47-52.

Ngaïssona “knew and *actively communicated* with Comzones in the *field*” (emphasis added).¹⁶³

88. The legal criterion of “whether the individual contribution of each co-perpetrator within the framework of the agreement is such that without it the crime would not be committed or would be committed in a significantly different way” is the “decisive consideration”¹⁶⁴ to support a finding of criminal responsibility under Article 25(3)(a) based on an “essential contribution”.¹⁶⁵ In other words, an essential contribution is one which is indispensable for the crime’s commission. At paragraph 49 of the Prosecution’s Response, the Prosecution’s reliance on an interview excerpt published on 1 April 2014 to support its contention that Mr Ngaïssona’s contributions were such that without them, “the crime would not have been committed or would have been committed in a significantly different way”¹⁶⁶ is disingenuous and does not meet the legal criterion.¹⁶⁷ In the interview, the journalist asked Mr Ngaïssona about his key role in the peace and reconciliation efforts in CAR, while raising the example of Anti-Balaka presence in Boda.¹⁶⁸ Mr Ngaïssona explained to the journalist that in his view, it is meaningful dialogue with the government that can bring about peace (“[c]’est le dialogue qui peut essayer de pacifier cette situation”).¹⁶⁹

89. To follow up on this question, the journalist asked Mr Ngaïssona whether his participation in the dialogue would bring about “different results”, to which Mr Ngaïssona said that it would.¹⁷⁰ Contrary to the Prosecution’s contention that this interview excerpt proves the *actus reus* element that “the crime would not have been committed or would have been committed in a significantly different way”, precisely the opposite is to be concluded on the basis of this interview. In the same interview, the journalist asks Mr Ngaïssona whether he

¹⁶³ Prosecution Response, para. 47.

¹⁶⁴ Prosecutor v Blé Goudé, Decision on the confirmation of charges, 12 June 2014, ICC-02/11-01/11-656-Red, para. 135.

¹⁶⁵ Prosecutor v Gbagbo, Decision on the confirmation of charges, 12 June 2014, ICC-02/11-01/11-656-Red, para. 232; Prosecutor v Blé Goudé, Decision on the confirmation of charges, 11 December 2014, ICC-02/11-02/11-186, para. 135; Prosecutor v. Katanga, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras 524-525.

¹⁶⁶ Prosecution Response, para. 49.

¹⁶⁷ Prosecution Response, para. 49. See Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 350.

¹⁶⁸ CAR-OTP-2001-4818 at 4819.

¹⁶⁹ The Defence invites the Chamber, parties, and participants to read the interview in its entirety to place the excerpts in their context, CAR-OTP-2001-4818 at 4819.

¹⁷⁰ CAR-OTP-2001-4818 at 4819.

has the “key to peace and reconciliation” (*“c’est vous qui avez les clefs de la paix et de la reconciliation entre les mains?”*), to which Mr Ngaïssona responds that this “key” lies between the hands of the Anti-Balaka and the government. Rather than being an “admission”¹⁷¹ on Mr Ngaïssona’s part that he “was capable of materially influencing the actions of Anti-Balaka groups” and therefore, made an essential contribution to the charged crimes, it is a recognition of Mr Ngaïssona’s efforts in the peace and reconciliation process, through the promotion of dialogue between all stakeholders involved in the conflict (*“nous avons besoin de toutes les entités”*),¹⁷² including the Anti-Balaka, ex-Seleka, international forces and the government, and through the setting-up of a DDR program.¹⁷³

90. The Prosecution’s argument that Mr Ngaïssona allegedly had the capacity of “materially influencing the actions of the Anti-Balaka”, which in its view “confirms the essential nature of his contributions to the group”,¹⁷⁴ should therefore be rejected.

IV. MR NGAÏSSONA HAD NO ACTUAL AUTHORITY, CONTROL OR INFLUENCE OVER THE ANTI-BALAKA

a. Modes of liability charged

91. In the Prosecution Response, the Prosecution challenges the Defence’s demonstration that the Prosecution’s evidence fails to show that Mr Ngaïssona held influence, authority and control over the Anti-Balaka and that he had the material ability to prevent, frustrate or alter the way in which crimes were committed.¹⁷⁵ Contrary to the Prosecution’s assertion, whether Mr Ngaïssona exercised influence and control over the Anti-Balaka is relevant to the Chamber’s determination of his purported essential contribution to the alleged common plan. The Prosecution’s case theory with regard to Mr Ngaïssona centers on his participation in a common plan whose aim was to claim power in CAR by instrumentalising the Anti-Balaka.¹⁷⁶ The Prosecution alleges that Mr Ngaïssona’s contribution rests on the

¹⁷¹ Prosecution Response, para. 49.

¹⁷² CAR-OTP-2001-4818 at 4819.

¹⁷³ CAR-OTP-2001-4818 at 4819.

¹⁷⁴ Prosecution Response, para. 49.

¹⁷⁵ Prosecution Response, paras 50-51.

¹⁷⁶ DCC, para. 3.

development and implementation of the strategic common plan, namely through his alleged instrumentalisation of the Anti-Balaka and their leaders.¹⁷⁷

92. The issue of Mr Ngaïssona's influence and control over the Anti-Balaka and the Anti-Balaka leaders is a significant part of the Prosecution's theory as to Mr Ngaïssona's individual criminal responsibility for the crimes charged.¹⁷⁸ The notion of instrumentalisation implies some form of control, authority or influence, which the Prosecution claims Mr Ngaïssona held. To give but one example, the Prosecution attributes a list of omissions to Mr Ngaïssona for which it argues Mr Ngaïssona should be held liable under the Statute, which includes his alleged failure to "discipline and punish members of the Anti-Balaka involved in the commission of crimes" and to "issue such orders, directives, or instructions as necessary and reasonable to prohibit or stop the commission of crimes by members of the Anti-Balaka".¹⁷⁹

93. Moreover, the theory of direct co-perpetration is grounded in the notion of control over a crime by virtue of an essential contribution. The issue of control is the distinguishing factor between 'commission' under Article 25(3)(a) and accessorial responsibility under Article 25(3)(b)-(d) for co-perpetration.¹⁸⁰

b. The Prosecution has failed to establish that the Anti-Balaka were sufficiently organised such that a person could control them

94. The Defence does not see how the conclusion that Mr Ngaïssona cannot control an organisation the existence of which has not been demonstrated should be rejected.¹⁸¹ In a case where one key contextual element is not established to the requisite standard, any allegation of control over such a non-existent element should be dismissed. Moreover, the Prosecution simply repeats its submissions made in the DCC regarding the allegation that Mr Ngaïssona was the de facto coordinator of the Anti-Balaka as of September 2013.¹⁸² The Defence rebutted this argument extensively in its oral submissions showing that Mr

¹⁷⁷ DCC, paras 3-5.

¹⁷⁸ See DCC, paras 1-5.

¹⁷⁹ See DCC, para. 169, xii) and xiii).

¹⁸⁰ Prosecutor v. Lubanga, Decision on confirmation of charges, ICC-01/04-01/06, 29 January 2007, paras 330-333.

¹⁸¹ Prosecution Response, para. 52.

¹⁸² Prosecution Response, para 53 footnote 143.

Ngaïssona was never part of an alleged inner circle that conceived of a common plan to regain power.¹⁸³

95. The Defence agrees that the existence of an organisation is not entirely dependent on the manner in which it arose. However, what does contradict the idea of an organisational policy, and which was the Defence's point, is the existence of this myriad of isolated groups, which indeed arose spontaneously, organised themselves separately and independently, not knowing one another and not being coordinated through a single command.¹⁸⁴ The Prosecution fails to substantiate how such Defence's point is not "apt" or how the Prosecution evidence cited by the Defence supports the existence of an organisation.¹⁸⁵
96. While the Defence did rely on NGO reports to support its point, these reports were only used as secondary evidence, confirmed by numerous corroborating testimonial evidence; the *overall* evidence, as presented by the Prosecution, is failing to support the Prosecution's conclusion that the Anti-Balakas constituted an organisation within the meaning of Article 7(2) of the Statute.
97. The Prosecution further argues that "[c]ontrary to Ngaïssona's submissions, the referenced evidence shows that the structure of the provincial Comzones as intended by Ngaïssona mirrored the structure of the National Coordination".¹⁸⁶ The Prosecution evidence does not show this. [REDACTED] testifies that before the Brazzaville agreement on 21-24 July 2014, there was no structure, it was only Comzones and their bases fighting.¹⁸⁷ Second, the Prosecution does not present sufficient evidence to show that it was upon Mr Ngaïssona's instruction, that certain local structures would have been put in place. [REDACTED] admits himself that he was not involved in Mr Ngaïssona's coordination and that he would not attend any meetings.¹⁸⁸ As to [REDACTED]'s statement that he would have become [REDACTED] for the only purpose of counting his elements, it is hardly relevant in the context of the present allegation.

¹⁸³ ICC-01/14-01/18-T-008-CONF-ENG ET, p. 89, ln. 4 to p. 108, ln. 9

¹⁸⁴ T-008-CONF-ENG ET, p. 108, ln. 10 to p. 118, ln. 14.

¹⁸⁵ Prosecution Response, para. 52.

¹⁸⁶ Prosecution Response, para. 53 and DCC, para. 66 and footnote 146.

¹⁸⁷ CAR-OTP-2046-0603-R01, at 0619, para. 96.

¹⁸⁸ CAR-OTP-2072-1739-R01, at 1753, lns 475-476. Also see 2072-1582-R01, at 1600, ln 617-621.

98. How the Prosecution defines “Anti-Balaka” in the DCC is highly irrelevant to the reality of the alleged structure, and constitutes, if anything, an admission of the sparse nature of those sub-groups, which supports the Defence theory.¹⁸⁹ As briefly raised by the Defence in its oral submissions,¹⁹⁰ Mr Ngaïssona is not charged only with crimes committed by Anti-Balaka affirmatively linked to the National Coordination.¹⁹¹ For instance, the crimes allegedly committed by Mr Yekatom’s group from December 2013 until end of February 2014 are included within the charges against Mr Ngaïssona, whereas several insider witnesses distinguish the Anti-Balakas from the North from those from the South.¹⁹² [REDACTED],¹⁹³ until they finally merged under the pressure of the government and the international community in June 2014, *i.e.* long after the last alleged crimes charged against Mr Yekatom.¹⁹⁴ These alleged crimes can therefore not possibly be attributed to Mr Ngaïssona. Contrary to the Prosecution’s claim, the evidence does not establish clear and concrete connections between Mr Yekatom and Mr Ngaïssona.¹⁹⁵ The Prosecution has failed to adduce any evidence of Mr Ngaïssona’s appointment of Mr Yekatom as leader, Mr Ngaïssona’s instructions and directions to him at the time of the alleged crimes, or any meetings and telephone contacts between both men around the time of the alleged commission of the alleged crimes.¹⁹⁶ On the contrary, the evidence demonstrates that the two men were not in contact until the preparation of the Brazzaville talks. The communiqué de presse [REDACTED], and cited by the Prosecution to demonstrate that [REDACTED],

¹⁸⁹ Prosecution Response, para. 54.

¹⁹⁰ T-008-CONF-ENG ET, p. 121, lns 16-18.

¹⁹¹ The Defence contests the existence of the alleged *de facto* coordination for the reasons already addressed, and therefore ignores this portion of the Prosecution’s allegation in the Prosecution Response, para. 54.

¹⁹² T-008-CONF-ENG ET, pp. 116-117.

¹⁹³ [REDACTED]

¹⁹⁴ T-008-CONF-ENG ET, p. 117, lns 2-4.

¹⁹⁵ Prosecution Response, para. 54.

¹⁹⁶ [REDACTED]’s general mention, with no indication of a time frame, that Mr Yekatom was under the orders of Mr Ngaïssona is contradicted by [REDACTED] who explains that “*ROMBHOT didn't report to anyone because he was the Chief*” and that it was “*later, when the Bureau for the Anti-Balaka was created and NGAÏSSONA became its coordinator*”, that Mr Yekatom was simply “in contact” with him, with no mention of Mr Yekatom being under Mr Ngaïssona’s order. See [REDACTED], CAR-OTP-2076-0146-R01, at 0158-0159, l. 427-448; [REDACTED], CAR-OTP-2041-0741-R01, at 0750, paras 64-65. [REDACTED]’s report of an alleged meeting on 20 December 2013 has already been addressed in the Defence oral submissions at T-0009-CONF-ENG RT, p. 32, lns 17-25. In light of the numerous witnesses’ testimonies reporting that Mr Ngaïssona became the coordinator of the merged coordination not earlier than June 2014, *i.e.* becoming the political coordinator of the Anti-Balakas from the South (*i.e.* Yekatom’s group) as from that moment on only, and when read in combination with [REDACTED], which dates the coordination’s contact with Mr Yekatom at the time of Brazzaville “because we knew that his elements listened to him and followed his instructions” and that the hope was that he would convey a message of peace, the Defence submits that the evidence adduced by the Prosecution at [REDACTED] is not sufficient. See [REDACTED], CAR-OTP-2093-0010-R01, at 0028, para. 102. With respect to the CDR evidence, the Defence incorporates herewith by reference its oral (T-0009 RT, p. 47, ln 20 to p. 48, ln 9) and written (see below) submissions in relation thereto.

is dated 3 July 2014, *i.e.* after the coordination merger and at the time of the preparation of the Brazzaville talks.¹⁹⁷

99. [REDACTED]¹⁹⁸ [REDACTED]¹⁹⁹

100. Regarding the alleged attacks in Bossangoa on 17 September and 5 December 2013 and Carnot, Berberati and Guen in February 2014, the Prosecution fails to adduce any evidence of contact between Mr Ngaïssona and the alleged direct perpetrators at the time of the alleged attacks.²⁰⁰ Regarding, more generally, the CDR evidence allegedly establishing concrete connections between Mr Ngaïssona and the respective alleged direct perpetrators, the Defence refers to its arguments made orally and in Section V of the Defence Observations as to the absence of *prima facie* reliability of the CDR evidence on which the Prosecution relies extensively.²⁰¹

101. To further support its allegation of an organisation, the Prosecution relies on [REDACTED]²⁰² [REDACTED].

102. This characterisation is corroborated by [REDACTED] who states that the Anti-Balaka movement was not structured or organised and that while there were a few titles given here and there, [REDACTED] did not perceive that it was hierarchised internally. [REDACTED]²⁰³ The fact that certain groups may have attempted to organise themselves internally does not lead to the conclusion that these groups altogether constituted an organisation under Article 7(2) of the Statute.

103. In light of the above, the Defence submits that the Prosecution's additional submissions are not sufficient to reinforce the weakness of the DCC on this matter.

c. The Prosecution has failed to establish that Mr Ngaïssona knew and had a relationship with the Comzones

¹⁹⁷ See CAR-OTP-2032-0074 cited in footnote 476 of the DCC.

¹⁹⁸ DCC, para. 319.¹⁹⁹ See DCC, paras 330, 319 referring to [REDACTED], CAR-OTP-2054-0904-R01, at 0912, para. 42²⁰⁰ DCC, paras 391-395, 525-528, 559-562, 598-604.

¹⁹⁹ See DCC, paras 330, 319 referring to [REDACTED], CAR-OTP-2054-0904-R01, at 0912, para. 42²⁰⁰ DCC, paras 391-395, 525-528, 559-562, 598-604.

²⁰⁰ DCC, paras 391-395, 525-528, 559-562, 598-604.

²⁰¹ T-0009-CONF-ENG RT, p. 44, ln. 23 to p. 47, ln. 20.

²⁰² CAR-OTP-2030-521, at 0539.²⁰³ [REDACTED] CAR-OTP-2107-0819-R01, p. 0835-0837, ln. 569-634²⁰⁴ T-008-CONF-ENG-RT, p. 91, ln. 12 to p. 92, ln. 14

²⁰³ [REDACTED] CAR-OTP-2107-0819-R01, p. 0835-0837, ln. 569-634²⁰⁴ T-008-CONF-ENG-RT, p. 91, ln. 12 to p. 92, ln. 14

104. The Prosecution begins its submissions by again repeating its arguments contained in the DCC in which it alleged that Mr Ngaïssona was close to Mr Bozizé and his inner circle. The Defence refuted these arguments in its oral submissions and the Prosecution has not provided any evidence to undermine the Defence's submissions.²⁰⁴ Contrary to the Prosecution's submissions,²⁰⁵ the Defence's allegation that Mr Ngaïssona had no precise knowledge of whom the Comzones were before the preparation of the Pareto mediation and Brazzaville talks is substantiated and is not merely Counsel's representation. The Defence has actually been quoting [REDACTED] and [REDACTED] to support the specific two references challenged by the Prosecution as being unsubstantiated.²⁰⁶

105. The only examples of Comzones the Prosecution claims Mr Ngaïssona knew and had a close relationship with, were [REDACTED] and [REDACTED],²⁰⁷ who were in Bangui and whom [REDACTED]. To support such contention, the Prosecution alleges that [REDACTED].²⁰⁸

106. Regarding [REDACTED], the only evidence adduced is the statement of [REDACTED] who states having met [REDACTED] at the compound of Mr Ngaïssona at some point in 2014.²⁰⁹ [REDACTED] Second, [REDACTED] is unable to date this encounter precisely. The Defence never contested that Mr Ngaïssona knew who [REDACTED] was. However, the Prosecution failed to substantiate concrete connections between both men as from September 2013. The reference to document [REDACTED] does not assist in this respect. First, the document is not signed. [REDACTED]²¹⁰[REDACTED]. [REDACTED].

²⁰⁴ T-008-CONF-ENG-RT, p. 91, ln. 12 to p. 92, ln. 14

²⁰⁵ Prosecution Response, para. 58.

²⁰⁶ See T-009-CONF-ENG-RT, p. 6, ln. 18 to p. 7, ln. 4; T-009-ENG-RT, p. 12, lns 16-22.

²⁰⁷ Prosecution Response, para. 59.

²⁰⁸ Prosecution Response, paras 59, 61.

²⁰⁹ [REDACTED],²¹⁰ See developments in Section IV above.²¹¹ Prosecution Response, para. 62, referring to CAR-OTP-2030-0460, at 0461.²¹² [REDACTED], CAR-OTP-2027-2290-R01, at 2304-2305, para. 89, [REDACTED], CAR-OTP-2093-0010-R01, at 0024-0025, para. 78.²¹³ CAR-OTP-2030-0460, at 0462.²¹⁴ [REDACTED], CAR-OTP-2107-0950-R01, p. 0983.²¹⁵ CAR-OTP-2001-4441.²¹⁶ [REDACTED]CAR-OTP-2094-0734-R01, at 0755-0759, lns 735-915.²¹⁷ [REDACTED]CAR-OTP-2094-0761-R01, at 0762-0765, lns 8-142[REDACTED]²¹⁸ CAR-OTP-2090-0561, at 0577, para. 102; CAR-OTP-2027-2290, at 2304, para. 86.

²¹⁰ See developments in Section IV above.²¹¹ Prosecution Response, para. 62, referring to CAR-OTP-2030-0460, at 0461.²¹² [REDACTED], CAR-OTP-2027-2290-R01, at 2304-2305, para. 89, [REDACTED], CAR-OTP-2093-0010-R01, at 0024-0025, para. 78.²¹³ CAR-OTP-2030-0460, at 0462.²¹⁴ [REDACTED], CAR-OTP-2107-0950-R01, p. 0983.²¹⁵ CAR-OTP-2001-4441.²¹⁶ [REDACTED]CAR-OTP-2094-0734-R01, at 0755-0759, lns 735-915.²¹⁷ [REDACTED]CAR-OTP-2094-0761-R01, at 0762-0765, lns 8-142[REDACTED]²¹⁸ CAR-OTP-2090-0561, at 0577, para. 102; CAR-OTP-2027-2290, at 2304, para. 86.

[REDACTED]²¹¹ [REDACTED].²¹² Second, the information contained in the [REDACTED] produced by the Prosecution has not been verified. [REDACTED] provides information that he has indirectly obtained from two individuals and makes non-objective assumptions such as, speaking of Mr Ngaïssona: [REDACTED].²¹³ Third, it is not possible from the text of the document to clearly understand the substance of Mr Ngaïssona's alleged declaration [REDACTED]. [REDACTED] [REDACTED]²¹⁴

107. Regarding [REDACTED],²¹⁵ [REDACTED] does not confirm this point, [REDACTED]²¹⁶ [REDACTED]. [REDACTED]²¹⁷ [REDACTED]. Many witnesses testify that upon his return to Bangui, Mr Ngaïssona did not live at his house but at his *father's* house,²¹⁸ [REDACTED],²¹⁹ his own house having been seized and looted by the Seleka²²⁰ and thereafter occupied by the Anti-Balakas, even before his return from Cameroon.²²¹ The Prosecution failed to substantiate that [REDACTED].

²¹¹ Prosecution Response, para. 62, referring to CAR-OTP-2030-0460, at 0461.²¹² [REDACTED], CAR-OTP-2027-2290-R01, at 2304-2305, para. 89, [REDACTED], CAR-OTP-2093-0010-R01, at 0024-0025, para. 78.²¹³ CAR-OTP-2030-0460, at 0462.²¹⁴ [REDACTED], CAR-OTP-2107-0950-R01, p. 0983.²¹⁵ CAR-OTP-2001-4441.²¹⁶ [REDACTED] CAR-OTP-2094-0734-R01, at 0755-0759, lns 735-915.²¹⁷ [REDACTED] CAR-OTP-2094-0761-R01, at 0762-0765, lns 8-142 [REDACTED]²¹⁸ CAR-OTP-2090-0561, at 0577, para. 102; CAR-OTP-2027-2290, at 2304, para. 86.

²¹² [REDACTED], CAR-OTP-2027-2290-R01, at 2304-2305, para. 89, [REDACTED], CAR-OTP-2093-0010-R01, at 0024-0025, para. 78.²¹³ CAR-OTP-2030-0460, at 0462.²¹⁴ [REDACTED], CAR-OTP-2107-0950-R01, p. 0983.²¹⁵ CAR-OTP-2001-4441.²¹⁶ [REDACTED] CAR-OTP-2094-0734-R01, at 0755-0759, lns 735-915.²¹⁷ [REDACTED] CAR-OTP-2094-0761-R01, at 0762-0765, lns 8-142 [REDACTED]²¹⁸ CAR-OTP-2090-0561, at 0577, para. 102; CAR-OTP-2027-2290, at 2304, para. 86.

²¹³ CAR-OTP-2030-0460, at 0462.²¹⁴ [REDACTED], CAR-OTP-2107-0950-R01, p. 0983.²¹⁵ CAR-OTP-2001-4441.²¹⁶ [REDACTED] CAR-OTP-2094-0734-R01, at 0755-0759, lns 735-915.²¹⁷ [REDACTED] CAR-OTP-2094-0761-R01, at 0762-0765, lns 8-142 [REDACTED]²¹⁸ CAR-OTP-2090-0561, at 0577, para. 102; CAR-OTP-2027-2290, at 2304, para. 86.

²¹⁴ [REDACTED], CAR-OTP-2107-0950-R01, p. 0983.²¹⁵ CAR-OTP-2001-4441.²¹⁶ [REDACTED] CAR-OTP-2094-0734-R01, at 0755-0759, lns 735-915.²¹⁷ [REDACTED] CAR-OTP-2094-0761-R01, at 0762-0765, lns 8-142 [REDACTED]²¹⁸ CAR-OTP-2090-0561, at 0577, para. 102; CAR-OTP-2027-2290, at 2304, para. 86.

²¹⁵ CAR-OTP-2001-4441.²¹⁶ [REDACTED] CAR-OTP-2094-0734-R01, at 0755-0759, lns 735-915.²¹⁷ [REDACTED] CAR-OTP-2094-0761-R01, at 0762-0765, lns 8-142 [REDACTED]²¹⁸ CAR-OTP-2090-0561, at 0577, para. 102; CAR-OTP-2027-2290, at 2304, para. 86.

²¹⁶ [REDACTED] CAR-OTP-2094-0734-R01, at 0755-0759, lns 735-915.²¹⁷ [REDACTED] CAR-OTP-2094-0761-R01, at 0762-0765, lns 8-142 [REDACTED]²¹⁸ CAR-OTP-2090-0561, at 0577, para. 102; CAR-OTP-2027-2290, at 2304, para. 86.

²¹⁷ [REDACTED] CAR-OTP-2094-0761-R01, at 0762-0765, lns 8-142 [REDACTED]²¹⁸ CAR-OTP-2090-0561, at 0577, para. 102; CAR-OTP-2027-2290, at 2304, para. 86.

²¹⁸ CAR-OTP-2090-0561, at 0577, para. 102; CAR-OTP-2027-2290, at 2304, para. 86.

²¹⁹ [REDACTED], CAR-OTP-2059-1648-R01, at 1670-1671, lns 842-845.

²²⁰ [REDACTED], CAR-OTP-2076-0911, at 0919, paras 45-48; [REDACTED], CAR-OTP-2074-2369-R01, at 2389, lns 686-687; [REDACTED], CAR-OTP-2072-1715-R01, at 1733, lns 627-634.

²²¹ See [REDACTED], CAR-OTP-2076-0911, at 0919, 0930, paras 45-48, paras 101-102. [REDACTED], [REDACTED]. See also [REDACTED], CAR-OTP-2054-0904-R01, at 0912, para. 42.

108. In light of the above evidence, the Prosecution's allegation of a close relationship between Mr Ngaïssona and [REDACTED] or [REDACTED] should be rejected. Regarding the Prosecution's more general allegation as to the personal relationships between Mr Ngaïssona and the Comzones, the Defence will not repeat what has been already developed above.

d. The Prosecution has failed to establish that Mr Ngaïssona appointed the Comzones

109. The Defence already addressed at length in the DCC the Prosecution's allegations that Mr Ngaïssona would have "appointed Comzones" and "had the power to replace" them.²²² The Prosecution is once again repeating its previous submissions, including by referring to that single same document [REDACTED] to, allegedly, "provide concrete evidence" that Mr Ngaïssona did in fact appoint Zone Commanders.²²³ First, it is noteworthy that the Prosecution does not present one single letter signed by Mr Ngaïssona by which he would have appointed a first-time Comzone, dated as of January 2014 or even before.²²⁴ The reliance on this one document is problematic in that [REDACTED]²²⁵ [REDACTED]. Looking only at the face of the document,²²⁶ [REDACTED]. Rather, the plain text of the document suggests that [REDACTED].²²⁷

110. With respect to the alleged power of Mr Ngaïssona to replace Comzones, the evidence adduced by the Prosecution is far from tangible.²²⁸ In support of that allegation, the Prosecution cites two witnesses, [REDACTED] and [REDACTED].²²⁹ [REDACTED] [REDACTED]²³⁰ [REDACTED]²³¹ As to [REDACTED], he only *heard* that a new coordination was put in place in [REDACTED] but again, does not confirm the context in

²²² T-009-CONF-ENG RT, p. 10, ln 5 to p. 19, ln. 6; p. 36.

²²³ Prosecution Response, para. 64 referring to CAR-OTP-2068-0077.

²²⁴ See e.g. [REDACTED], CAR-OTP-2031-0241, at 0254, para. 72 which shows that the existence of Comzones pre-existed the return of Mr Ngaïssona in Bangui and the creation of the coordination.

²²⁵ [REDACTED] CAR-OTP-2068-0037-R01, at 0054, para. 80.²²⁶ Prosecution Response, para. 65.²²⁷ This is corroborated by [REDACTED]. [REDACTED], CAR-OTP-2068-0037-R01, at 0059, para. 107.

²²⁶ Prosecution Response, para. 65.²²⁷ This is corroborated by [REDACTED]. [REDACTED], CAR-OTP-2068-0037-R01, at 0059, para. 107.

²²⁷ This is corroborated by [REDACTED]. [REDACTED], CAR-OTP-2068-0037-R01, at 0059, para. 107.

²²⁸ DCC, footnote 343.

²²⁹ See DCC, para. 142 and footnotes 342 and 343.

²³⁰ [REDACTED] CAR-OTP-2072-1739-R01, at 1766, lns 917-943.²³¹ [REDACTED], CAR-OTP-2092-4340, at 4344, lns 119-122.

²³¹ [REDACTED], CAR-OTP-2092-4340, at 4344, lns 119-122.

which this replacement took place.²³² [REDACTED] further states that he does not know if people would be replaced²³³ but explains that it would be difficult to remove anyone because this was something that was dealt with locally/internally.²³⁴ Finally, document CAR-OTP-2101-4166 is not relevant to the allegation in question as it refers to [REDACTED]. Therefore, the Prosecution's evidence is not sufficient to provide substantial grounds to believe that Mr Ngaïssona appointed and replaced Comzones.

111. Contrary to the Prosecution's argument that Mr Ngaïssona's "formal acceptance" of the various leaders satisfies the requirements of aiding and abetting,²³⁵ the mere acknowledgment by Mr Ngaïssona of a pre-existing situation does not meet the threshold of Article 25(3)(c), which requires a "substantial contribution" to the crime.²³⁶ Moreover, Article 25(3)(c) requires that a contribution be made "for the purpose" of committing those crimes, which amounts to an elevated *mens rea*.²³⁷ Rather, the evidence shows that any acknowledgment of the already existing leadership by Mr Ngaïssona would have been made in the context of the DDR.²³⁸ Thus, contrary to the Prosecution's assertion on the law, mere presence at a meeting and tacit approval of impugned illicit activities²³⁹ is clearly insufficient, as it ignores the requirement of a causal link between the assistance and the crime,²⁴⁰ as well as the *mens rea* requirements.²⁴¹
112. The Prosecution's subsequent argument that Mr Ngaïssona should be held liable by virtue of his omissions equally fails.²⁴² Aiding and abetting by omission requires not only that the objective and subjective elements be met, but also that a suspect have a correlate duty to act

²³² [REDACTED], CAR-OTP-2074-2369-R01, at 2380, lns 352-371.

²³³ [REDACTED], CAR-OTP-2074-2369, at 2379, lns 319-321.

²³⁴ [REDACTED], CAR-OTP-2074-2369, at 2379, lns 323-333.

²³⁵ Prosecution Response, para 66-7.

²³⁶ Prosecutor v. Mbarushimana, Decision on the Confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 279; Prosecutor v. Lubanga, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 997; Prosecutor v. Ruto et al., Decision on the Confirmation of charges pursuant the Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, para. 354.

²³⁷ Prosecutor v. Mbarushimana, Decision on the Confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, paras 274, 281.

²³⁸ ICC-01/14-01/18-T-009-CONF-ENG ET. See also footnote 132 above.

²³⁹ Prosecution Response, para. 67.

²⁴⁰ Prosecutor v. Gbagbo and Blé Goudé, Reasons of Geoffrey Henderson, 16 July 2019, ICC-02/11-01/15-1263-Conf-AnxB, paras 2019-2020.

²⁴¹ Prosecutor v. Mbarushimana, Decision on the Confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, paras 274, 281.

²⁴² Prosecution Response, para. 68.

in the circumstances,²⁴³ which has not been demonstrated by the Prosecution. The Prosecution's arguments relating to Mr Ngaïssona's alleged omissions are "abstract and generic".²⁴⁴ The recent findings by Judge Henderson in the Gbagbo and Blé Goudé case are fitting to the facts and evidence presented by the Prosecution here:

At this level of abstraction and generality, almost every act in support of an institution or organisation can be said to have made a contribution to the conduct of individual members of such institution or organisation. At some point, the causal link between the contribution and the specific criminal conduct, although theoretically present, becomes so tenuous that it becomes artificial to say that the physical perpetrator was genuinely assisted by the contribution.²⁴⁵

e. The Prosecution has failed to establish that Mr Ngaïssona gave orders that were complied with

113. It is on the Prosecution to prove its case. The Defence does not have the obligation to present any evidence especially when the Prosecution's own evidence is insufficient, inconsistent and/or contradicts its own case. The Defence is not claiming or asserting anything.²⁴⁶ The Defence however has demonstrated that based on the evidence presented, the Prosecution had failed to demonstrate to the requisite standard that its own allegations were true, *i.e.* that (i) Mr Ngaïssona was able to summon Comzones to attend meetings as from January 2014 during which orders would have been issued, or that (ii) he had been giving combat related orders which would have been complied with. If the evaluation of the credibility of *witnesses* at the confirmation of charges stage is "necessarily presumptive", according to the Pre-Trial Chamber in the *Ongwen* case,²⁴⁷ the jurisprudence does not however suggest that the accuracy of the Prosecution's allegations or of its evidence analysis/interpretation should be presumed.²⁴⁸

²⁴³ Prosecutor v. Brđanin, Appeal Judgment, 3 April 2007, IT-99-36-A, para. 274; Prosecutor v. Orić, Appeal Judgment, 3 July 2008, IT-03-68-A, para. 43; Prosecutor v. Mršić et al., Appeal Judgment, 5 May 2009, IT-95-13/1-A, para. 49; Prosecutor v. Šainović, Appeal Judgment, 23 January 2014, IT-05-87-A, para. 1677. The Trial Chamber in Orić held that the "requirement of a 'duty to act', which the offender must have derelicted in order to be held criminally liable for omission, appears to be considered as so obvious that it is rarely explicitly mentioned when judgements speak of 'acts and omissions'", Prosecutor v. Orić, Judgment, 30 June 2006, IT-03-68-T, 30, para. 273, footnote 741.

²⁴⁴ Prosecutor v. Gbagbo and Blé Goudé, Reasons of Geoffrey Henderson, ICC-02/11-01/15-1263-Conf-AnxB, para. 2020.

²⁴⁵ Prosecutor v. Gbagbo and Blé Goudé, Reasons of Geoffrey Henderson, ICC-02/11-01/15-1263-Conf-AnxB, para. 2020.

²⁴⁶ Prosecution Response, para. 69.

²⁴⁷ ICC-02/04-01/15-422-Red, para. 18.

²⁴⁸ Prosecution Response, para. 69. See ICC-01/04-01/10-465-Red, para. 47.

114. In the Prosecution Response, the Prosecution did not even attempt to demonstrate how its own evidence, as pointed out at length by the Defence, fits its theory that Mr Ngaïssona gave combat-related instructions to Comzones in the field, including to attack certain targets and locations.²⁴⁹

115. The Prosecution ignores its own overwhelming evidence contradicting its theory and, instead, chooses to make a selection of a few excerpts of statements or speeches,²⁵⁰ either too general, taken out of context, or based on indirect information, to allegedly show that Mr Ngaïssona was able to give orders which were complied with. While citing one sentence from [REDACTED] in relation to Mr Ngaïssona's appeal to cease hostilities, the Prosecution ignores the evidence of [REDACTED], [REDACTED], [REDACTED], [REDACTED], or [REDACTED], cited by the Defence,²⁵¹ showing that Mr Ngaïssona's appeals were ignored. The Prosecution does not point to (i) any evidence of Mr Ngaïssona launching any attacks whatsoever or (ii) incident reports addressed to Mr Ngaïssona from the field. The Prosecution ignores the evidence of [REDACTED] or [REDACTED] establishing that Mr N would not give orders to the Comzones.²⁵² [REDACTED] is not as clear as the Prosecution alleges. While stating, about appeals to civil disorders, that everybody had to execute Mr Ngaïssona's instructions, he also states that there were certain orders he would not fully implement.²⁵³

116. In brief, the Prosecution repeated previous submissions and failed to address the inconsistencies and contradictions in the Prosecution's evidence raised by the Defence. As a result, the Defence's conclusions in relation to the Prosecution's evidence stand.

f. The Prosecution has failed to establish that Mr Ngaïssona had the power to discipline

117. The Prosecution reiterates its argument that there is no requirement that Mr Ngaïssona commanded or controlled the Anti-Balaka to satisfy the elements of Article 25(3)(c) in

²⁴⁹ See DCC, paras 69-73.

²⁵⁰ DCC, paras 70-73.

²⁵¹ T-009-CONF-ENG RT, p. 22, ln. 11 to p. 23, ln. 19. See P-0568, CAR-OTP-2045-1335, at 1336, lns 30-32.

²⁵² [REDACTED], CAR-OTP-2045-0048-R001, at 0055, para. 42 ; [REDACTED], CAR-OTP-2107-3500-R01, at 3517, lns 590-596.

²⁵³ [REDACTED], CAR-OTP-2048-0171, at 0183-0184, para. 70.

relation to Mr Ngaïssona's purported power to discipline.²⁵⁴ The Defence refers to its arguments developed on modes of liability above.²⁵⁵

118. [REDACTED]²⁵⁶[REDACTED]²⁵⁷[REDACTED]²⁵⁸[REDACTED]²⁵⁹[REDACTED]²⁶⁰
[REDACTED]²⁶¹[REDACTED]²⁶²[REDACTED]²⁶³

119. [REDACTED]²⁶⁴[REDACTED]²⁶⁵[REDACTED]²⁶⁶[REDACTED]

g. The Prosecution has not refuted the Defence submissions that the Anti-Balaka crimes could have been committed by “fake” elements

120. The Prosecution contradicts itself, on the one hand claiming that Mr Ngaïssona would dismiss crimes as committed by fake Anti-Balakas, on the other hand claiming that Mr

²⁵⁴ Prosecution Response, paras 75-6.

²⁵⁵ Defence Observations, Sections IV f) and d).

²⁵⁶[REDACTED]CAR-OTP-2025-0324, at 0338, 0348, paras 95, 150; CAR-OTP-2025-0356.²⁵⁷ Prosecution Response, para. 77.²⁵⁸ Prosecution Response, para. 77.²⁵⁹[REDACTED] CAR-OTP-2059-1626, at 1634-1636.²⁶⁰ [REDACTED]CAR-OTP-2025-0324, at 0338, para. 95.²⁶¹[REDACTED]2059-1602-R01, at 1605, lns 92-98.²⁶²[REDACTED]CAR-OTP-2025-0324, at 0347.²⁶³ DCC, para. 78.²⁶⁴ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0409.²⁶⁵ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0413.

²⁵⁷ Prosecution Response, para. 77.²⁵⁸ Prosecution Response, para. 77.²⁵⁹[REDACTED] CAR-OTP-2059-1626, at 1634-1636.²⁶⁰ [REDACTED]CAR-OTP-2025-0324, at 0338, para. 95.²⁶¹[REDACTED]2059-1602-R01, at 1605, lns 92-98.²⁶²[REDACTED]CAR-OTP-2025-0324, at 0347.²⁶³ DCC, para. 78.²⁶⁴ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0409.²⁶⁵ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0413.

²⁵⁸ Prosecution Response, para. 77.²⁵⁹[REDACTED] CAR-OTP-2059-1626, at 1634-1636.²⁶⁰ [REDACTED]CAR-OTP-2025-0324, at 0338, para. 95.²⁶¹[REDACTED]2059-1602-R01, at 1605, lns 92-98.²⁶²[REDACTED]CAR-OTP-2025-0324, at 0347.²⁶³ DCC, para. 78.²⁶⁴ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0409.²⁶⁵ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0413.

²⁵⁹[REDACTED] CAR-OTP-2059-1626, at 1634-1636.²⁶⁰ [REDACTED]CAR-OTP-2025-0324, at 0338, para. 95.²⁶¹[REDACTED]2059-1602-R01, at 1605, lns 92-98.²⁶²[REDACTED]CAR-OTP-2025-0324, at 0347.²⁶³ DCC, para. 78.²⁶⁴ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0409.²⁶⁵ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0413.

²⁶⁰ [REDACTED]CAR-OTP-2025-0324, at 0338, para. 95.²⁶¹[REDACTED]2059-1602-R01, at 1605, lns 92-98.²⁶²[REDACTED]CAR-OTP-2025-0324, at 0347.²⁶³ DCC, para. 78.²⁶⁴ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0409.²⁶⁵ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0413.

²⁶¹[REDACTED]2059-1602-R01, at 1605, lns 92-98.²⁶²[REDACTED]CAR-OTP-2025-0324, at 0347.²⁶³ DCC, para. 78.²⁶⁴ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0409.²⁶⁵ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0413.

²⁶²[REDACTED]CAR-OTP-2025-0324, at 0347.²⁶³ DCC, para. 78.²⁶⁴ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0409.²⁶⁵ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0413.

²⁶³ DCC, para. 78.²⁶⁴ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0409.²⁶⁵ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0413.

²⁶⁴ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0409.²⁶⁵ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0413.

²⁶⁵ Prosecution Response, para. 77 referring to CAR-OTP-2032-0179, at 0413.

²⁶⁶ DCC, para. 78.²⁶⁷ Prosecution Response, para. 80.

Ngaïssona publicly acknowledged exactions and abuses occurring within the Anti-Balakas.²⁶⁷

121. The Prosecution fails to demonstrate that this notion of “fake” Anti-Balakas was a “false” claim conceptualised by Mr Ngaïssona to dismiss the Anti-Balaka’s responsibility for certain crimes committed.²⁶⁸ The Defence has shown that many witnesses, from different backgrounds, also explained the reality of this phenomenon, and testified to the fact that many individuals presented themselves as Anti-Balakas, and before that, as Selekas, in order to be able to commit crimes which had nothing to do with the movement.²⁶⁹ The Defence gave a few examples, based on the Prosecution’s own material, in its oral submissions but there are many more in the case record.²⁷⁰

122. The Defence’s point was that the existence of this phenomenon was one additional factor contradicting the theory of the existence of an organisation as shaped by the Prosecution. The Prosecution failed to respond to this reality only to limit his response to how Mr Ngaïssona would have personally used the notion of fake Anti-Balakas, which is not relevant.²⁷¹

h. The Prosecution has failed to establish that Mr Ngaïssona had the power to order the erection of roadblocks, or the killing or assaulting of Muslims

123. In the Prosecution Response, the Prosecution provides no cogent argument or references in response to the Defence’s challenge of the reliance by the Prosecution of Mr Ngaïssona’s call for peace during the Ramadan.²⁷² Rather, the Prosecution claims that the document “comprises proof of his material ability to affect the commission of the crimes charges, as well as his failure to do so at an earlier opportunity”,²⁷³ which are patently unconvincing.

124. The Prosecution’s argument that Mr Ngaïssona was cognisant of the targeting of Muslims and aware of the existence of roadblocks erected by the Anti-Balaka, is clearly insufficient

²⁶⁷ Prosecution Response, para. 80.

²⁶⁸ Prosecution Response, para. 80.

²⁶⁹ See T-008-CONF-ENG ET, p. 118, ln. 15 to p. 120, ln. 21.

²⁷⁰ See e.g. [REDACTED], CAR-OTP-2046-0455, at 0464, [REDACTED], CAR-OTP-2107-5208-R01, at 5228, paras 729 and seq.

²⁷¹ Prosecution Response, para. 80.

²⁷² CAR-OTP-2084-0157.

²⁷³ Prosecution Response, para. 83

to support any one of the complex mens rea requirements under the modes of liability charged, namely Articles 25(3)(a), (c) and (d).²⁷⁴

V. CALL DATA RECORDS

a. On the reliability of Call Data Records

125. In relation to the CDR evidence, the Prosecution, again, effectively reverses the burden of proof on the Defence by claiming that the Defence has shown “[n]o concrete evidence, or expert opinion” to “challenge the integrity of CDR”.²⁷⁵ This stands contrary to a suspect’s right “[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal” and the presumption of innocence.²⁷⁶

126. The Prosecution argues that it follows strict protocols in respect of the collection of CDRs, but offers no reference or document to support its methodology. Even if the Chamber were to conclude that the CDR evidence is authentic on its face, it does not mean that it is reliable or probative.²⁷⁷ Authenticity is but one element of reliability. Moreover, the fact that the CDR is susceptible to errors, some of which are more “obvious” than others,²⁷⁸ is an indicator of its diminished *prima facie* reliability.

127. Moreover, the Prosecution’s acknowledgment that the four alleged calls between Mr Ngaïssona and [REDACTED] in the days leading up to the 5 December attack “may be duplicates, considering the proximity of their timing” of a mere few minutes,²⁷⁹ raises serious concerns as to the reliability of the CDR evidence as a whole. Several other apparent duplications contained in the Call sequence tables were located by the Defence, which despite their appearance of being “frequent” contacts, are in fact, likely errors in the data processing.²⁸⁰ These telephone calls which from the Prosecution’s own assertion *may* be

²⁷⁴ Prosecution Response, para. 83-84.

²⁷⁵ Prosecution Response, para. 88.

²⁷⁶ Rome Statute, Article 67(2)(i).

²⁷⁷ Prosecutor v. Lubanga, Decision on the confirmation of charges, 7 February 2007, ICC-01/04-01/06-803, para. 97; See Prosecutor v. Mbarushimana, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 136, where the Chamber had concluded that “The Chamber indeed finds that the evidence submitted by the Prosecution does not provide *any reliable indicia* with regard to who the perpetrators were” and declined to confirm the charges on the basis of an absence of substantial grounds to believe that certain war crimes had been committed.

²⁷⁸ Prosecution Response, para. 89.

²⁷⁹ Prosecution Response, para. 89.

²⁸⁰ See for instance, Annex J., Section 6.5.2. two entries of 23/03/2014 each with the time stamp 16:29:36 and 16:29:55 with the respective call durations of 13 and 12 seconds, to and from the exact same telephone numbers;

duplicates,²⁸¹ are separated by a few minutes – and not seconds – which represents a considerable margin of error. The probable errors are sufficient to refute any presumption of *prima facie* reliability of the CDR and this evidence should therefore be rejected.

b. On the relevance of Call Data Records

128. The Prosecution asks the Chamber to infer from the CDR “familiarity of collectors, their locations and their intent or knowledge concerning certain events or circumstances”.²⁸² Such inferences, especially with regard to the “intent or knowledge” of individuals including Mr Ngaïssona, based on the CDR, is entirely speculative.

129. With regard to the alleged contacts between Mr Ngaïssona and the local Anti-Balaka leaders in Bossangoa, which the Prosecution argues based on its Call sequence table would show Mr Ngaïssona’s “familiarity with, and ability to directly contact local Anti-Balaka leaders”,²⁸³ in particular through his purported contacts with [REDACTED]²⁸⁴ the Prosecution fails to show how this data demonstrates Mr Ngaïssona’s “inertia and failure to intervene to end the situation”, referring to the Muslim enclave in Bossangoa.²⁸⁵

130. The Prosecution asks the Chamber to draw mere inferences upon inferences, which are neither reasonable nor based on “common sense and ordinary human experience”;²⁸⁶ however, such a multiplication of inferences only serves to weaken and not strengthen the evidence upon which the inferences ultimately rely. This stands in contravention to the requirement that the Prosecution must “offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations” in order for it to meet its evidentiary burden.²⁸⁷

see Section 6.5.2., two entries for 20/11/2014 with the time stamps 12:13:18 and 12:13:55, with respective call durations of 11 and 8 seconds; Section 6.5.1., two entries from 24/01/2014 each with the time stamp 8:23:09 and 8:24:00, with the respective call durations of 39 and 36 seconds, to and from the exact same telephone numbers; Section 7.1.4., two entries on 22/01/2014 each with the time stamps 9:14:58 and 9:15:53 for a duration of 41 and 38 seconds respectively.

²⁸¹ Prosecution Response, para. 89.

²⁸² Prosecution Response, para. 91.

²⁸³ Prosecution Response, para. 92.

²⁸⁴ There are only two alleged calls recorded between them, Annex J²⁸⁵ Prosecution Response, para. 92, referring to the DCC, para. 169.

²⁸⁵ Prosecution Response, para. 92, referring to the DCC, para. 169.

²⁸⁶ Prosecution Response, para. 93.

²⁸⁷ Prosecutor v Lubanga, Decision on the confirmation of charges, 7 February 2007, ICC-01/04-01/06-803, para. 39.

131. Based on the i) significant doubts in relation to attribution of the telephone numbers to Mr Ngaïssona and his alleged interlocutors; the often ii) infrequent and iii) short nature of the alleged calls; iv) the complete absence of information as to the content of such calls; and v) the absence of *prima facie* reliability of the CDR based on errors such as duplicates, the Defence requests the Chamber to reject the conclusions the Prosecution asks it to draw on the basis of the CDR evidence, including that Mr Ngaïssona held “influence and control” over the Anti-Balaka leadership.

c. On the attribution of phone numbers to Mr Ngaïssona

132. In its oral submissions, the Defence has convincingly shown that the attribution of the telephone number [REDACTED] was not established by the Prosecution to the threshold of reasonable grounds to believe. In its Response, the Prosecution attempts to attribute this telephone number to Mr Ngaïssona by relying on a newly disclosed item which does not appear on the Prosecution’s list of evidence, [REDACTED]²⁸⁸

133. *First*, these additional observations contravene the Chamber’s order which specifically stated that the Prosecution must refer to specific items of evidence supporting any allegation.²⁸⁹ This item is not part of the Prosecution’s evidence, and therefore cannot be relied upon by the Prosecution. *Second*, the Defence could not locate a Request for Assistance or any corresponding judicial or administrative order from a domestic jurisdiction or ICC Chambers used to obtain the [REDACTED], despite this type of evidence being material to the Defence and would allow it to “test the reliability of the procedure employed in collecting the evidence against it”.²⁹⁰ *Third*, the document contains several deficiencies. [REDACTED] Therefore, for these reasons, the Prosecution cannot rely on this item for call data attribution to Mr Ngaïssona.

VI. CONCLUSION

134. For the above-mentioned reasons, the Prosecution’s submissions should be dismissed in their entirety, and the Chamber should not confirm the charges against Patrice-Edouard Ngaïssona.

²⁸⁸ CAR-OTP-2117-0389.²⁸⁹ ICC-01/14-01/18-T-010-ENG ET, p. 4, lns 12-14.

²⁸⁹ ICC-01/14-01/18-T-010-ENG ET, p. 4, lns 12-14.

²⁹⁰ ICC-01/14-01/18-315-Conf, para. 68.

Respectfully submitted,

Done in The Hague, The Netherlands, 1 November 2019

A handwritten signature in black ink, appearing to be 'Mr Knoop', written in a cursive style.

Mr Knoop

Lead Counsel for Mr Patrice-Edouard Ngaïssona